

Modern Equal Protection Theories: A Metatheoretical* Taxonomy and Critique

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I. INTRODUCTION

The last dozen or so years have witnessed a renaissance in theorizing about some perennial questions of constitutional law: What are proper principles of constitutional interpretation, and what use do those principles make of the "intent" of "the Framers," the "meaning" of the words the Framers employed, and post-ratification changes in social circumstances and in empirical and philosophical opinion? What are the proper roles of the legislatures and courts in interpreting and applying various constitutional provisions? What are the proper sources for the ethical norms that courts (and legislatures) must resort to under certain constitutional provisions?

John Ely's much and deservedly heralded book, *Democracy and Distrust*,¹ a book whose coming was foretold by a flurry of major law review articles,² deals with these questions. Moreover, it deals with them quite brilliantly, marking it as perhaps the most important theoretical work among the recent ones.³ Nonetheless, despite its brilliance, Ely's book fails as the definitive treatment of constitutional theory. Many obvious and not so obvious questions and objections are raised by Ely's "answers" to the perennial problems—questions and objections that are not dealt with satisfactorily in the book or in Ely's prior articles.

Many of the questions and objections provoked by Ely's book will no doubt be raised by others, including the contributors to this Symposium.⁴ My ambition in this Article is to map out at least part of the terrain of constitutional theory and to plot both Ely's and the other modern theorists' positions on that map. My hope is that by doing so I will make it easier to perceive the

*This Article is thus a member of that species described by Professor Leon Lipson of Yale Law School as "Anything you can do, I can do meta." That gem was saved for posterity by Lipson's colleague, Arthur Leff. Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1230 n.2. Some readers may feel after reading this Article that Lipson's put-down was quite warranted; many of us are shamelessly undeterred by it nonetheless.

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1. J. ELY, *DEMOCRACY AND DISTRUST* (1980) [hereinafter cited as ELY].

2. Ely's recent articles whose major themes found their way into his book are *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); *The Centrality and Limits of Motivation Analysis*, 15 SAN DIEGO L. REV. 1155 (1978); *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399 (1978); *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 1 (1978); *Toward a Representation—Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978).

3. On the other hand, Laurence Tribe's treatise, while short on the issues of constitutional interpretation and judicial review, does deal brilliantly with substantive value questions. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978).

4. Michael Perry has raised many in his forthcoming book, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS*. See also Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

relation of Ely's positions to the others', easier to perceive the difficulties with the various positions, and, most importantly, easier to perceive which theoretical issues must be resolved first before others can be resolved. My contention is that constitutional theory remains in unsatisfactory condition, not just because the Supreme Court has done sloppy work (though it has), but also because the commentators have opted to skirt theoretical issues that are logically prior to the topics that have been their primary concern.

II. CONSTITUTIONAL INTERPRETATION

A. *Interpretivism, Noninterpretivism, and the Relation of Meaning and Authority*

If Ely's book attains the prominence I predict for it, part of the credit must go to Raoul Berger, a true gadfly of constitutional theory, and especially his book, *Government by Judiciary*.⁵ Berger has forced all serious constitutional theorists to deal with questions regarding proper principles of constitutional interpretation and the proper role of the courts, questions that many theorists, basking in the warm glow of Warren Court decisions on individual rights, felt content to ignore.⁶ Berger has quite convincingly demonstrated that the bulk of modern judicial decisions under the fourteenth amendment cannot be justified by reference to what the drafters of that amendment believed the amendment would accomplish. Moreover, Berger has argued with great force that judicial decisions that cannot be justified by what the constitutional Framers specifically intended are illegitimate in a democracy.⁷ The title of his book is thus for Berger both a description of reality and of tyranny.

Berger's challenge to the pedigree of modern fourteenth amendment jurisprudence has sent some scholars scurrying to unearth conflicting historical evidence of the Framers' intent.⁸ Others have accepted Berger's picture of the role assumed by the judiciary but have rejected Berger's contention that such a role is illegitimate in our democracy.⁹ Still others, like Ely, have divided the Constitution into provisions that embody the norms of the Framers and provisions that represent delegations to the courts to supply norms. In applying the former provisions, "interpretivism"¹⁰ is the proper

5. R. BERGER, *GOVERNMENT BY JUDICIARY* (1977).

6. Ely was not one of those theorists. See Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

7. R. BERGER, *GOVERNMENT BY JUDICIARY* 407-18 (1977). See also Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

8. See, e.g., Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651 (1979). See also Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

9. See, e.g., Bennett, "Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory, 67 CAL. L. REV. 1049, 1088-95 (1979); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029 (1977); Perry, *Book Review*, 78 COLUM. L. REV. 685 (1978).

10. "Interpretivism" is Ely's neologism. Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399 (1978). Brest refers to the same concept as "originalism." Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

judicial technique. In applying the latter provisions, because there are no norms to "interpret," the judicial technique employed in fleshing out the provisions is "noninterpretivism."

In my opinion, the Berger-inspired revival of attention to principles of interpretation and the role of interpretation in constitutional law, as salutary as it has been, has not been sufficiently theoretically sophisticated for ultimately resolving the interpretation issues. *Not a single theorist has presented anything like a full-blown theory of what "interpretation" really is and whether "interpretation" of a legal document is an ethically neutral technique or is at least partially ethically freighted. We are still lacking even a rudimentary theory of legal and particularly constitutional hermeneutics.*¹¹ Let me explain.

1. Interpretation

What are we doing when we say we are "interpreting" some categorical command another has given us? The command can be oral or written. It can be in an instrument described as a constitution, a statute, a contract, a will, a trust, and so forth. I will assume, in order to avoid obvious complications, that the author of the command is a single person, not a collective body like a legislature, a constitutional convention, or a labor union.

One thing that seems absolutely clear is that, whatever else we are doing, we are *not* "interpreting" the command if we pay no heed to the identity and circumstances of its author. Symbols on a page or sounds have no "meaning" to interpret in the abstract.¹² We need to know that the symbols or sounds were made by human beings who purported to be communicating before we become concerned with the symbols' or sounds' meaning. (The marks "dog" in the sand do not refer to a four-legged domestic mammal if they were made by the waves.) We need to know the language they were employing. (The symbols "canard" do not refer to an untruth if the language of the symbol user was French and not English.) And we need to know something about the

11. Insofar as constitutional hermeneutics is concerned, the best theoretical works in my estimation are those of Brest and Munzer-and-Nickel. See Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029 (1977). But Brest and Munzer-and-Nickel are noninterpretivists who therefore need not ultimately decide the nature of constitutional interpretation. One book, devoted entirely to a study of constitutional language, disclaims any intention to resolve the proper meaning of constitutional interpretation. See J. BRIGHAM, *CONSTITUTIONAL LANGUAGE* 16-17 (1978). On legal hermeneutics in general, see W. BISHIN & C. STONE, *LAW, LANGUAGE, AND ETHICS* 473-538 (1972); P. BREST, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 36-44 (1975); B. CARDÓZO, *THE NATURE OF THE JUDICIAL PROCESS* 112-15 (1921); R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* (1975); J. GRAY, *THE NATURE AND SOURCES OF THE LAW* 172-73 (1921); L. HAND, *THE BILL OF RIGHTS* 18-25 (1958); H. HART, *THE CONCEPT OF LAW* 121-23 (1961); H. HART & A. SACKS, *THE LEGAL PROCESS* (tent. ed. 1958); W. PROBERT, *LAW, LANGUAGE AND COMMUNICATION* (1972); Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); MacCallum, *Legislative Intent*, 75 YALE L.J. 754 (1966).

12. See L. COHEN, *THE DIVERSITY OF MEANING* 3 (1962); Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1043-44 (1977).

communicator's purposes. (The injunction to "drive carefully" does not carry the same meaning on the first tee as it does on the highway.)

One way perhaps to look at interpretation is to view it as the answer that the author of the command would give if the interpreter asked, with respect to a case before him, "Does your command cover this case, and, if so, how does it direct me to resolve it?"¹³ Thus, Raoul Berger would say that, as he interprets "equal protection of the laws," it covers only official *racial* discrimination of the type exemplified by the Black Codes and outlawed by the 1866 Civil Rights Act, and it does not outlaw "separate-but-equal" racial segregation of schools.¹⁴ One reason for Berger's conclusion is that he believes, based on his historical evidence, that had the Framers been asked at the time they were enacting the fourteenth amendment, "Does your amendment outlaw discrimination against *women*, or outlaw racial segregation of schools?," they would have answered, "No."

Is our concept of interpretation at root based upon the model of a hypothetical question directed at the author of the communication that is to be interpreted? If so, then several further problems must be dealt with to understand interpretation fully. First, is it possible for the author of the command to be mistaken in his hypothetical answer to the hypothetical question? More specifically, is it conceptually possible that the words he has chosen *do not carry*, as opposed to carry inartfully, the meaning he attributes to them? Paul Brest suggests that, just as the purposes of the author influence the "meaning" of the words, so too do the words and their dictionary "meanings" restrict the range of purposes that can be attributed to those words.¹⁵ Thus, an author might "misinterpret" his own command. I wonder.

Second, what is the role in such a hypothetical question and answer technique of the command's author's factual errors? Suppose he "answers" that equal protection does not cover racially segregated schools because racially segregated schools can be equal, and we believe we could show him that racially segregated schools *cannot, as a matter of fact, be equal*. Do we properly "interpret" equal protection when we apply it as we believe the Framers would have wanted had they had the same factual beliefs that we have, and not the mistaken factual beliefs they did have? If so, what do we do with a constitutional provision that would never have been enacted but for a factual mistake?¹⁶

13. For discussion of interpretation as a hypothetical question addressed to the author of the command in question, see Westen & Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311, 334 (1980); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 209-12, 222-23 (1980).

14. R. BERGER, *GOVERNMENT BY JUDICIARY* 191-92 (1977).

15. P. BREST, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 44 (1975). See also Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980). In the latter article Brest divides interpretation into two modes, "textualism" and "intensionalism." *Id.* at 205, 209. Because the linguistic and social contexts are relevant to interpretation in the textualist mode, *id.* at 206, I think that whatever differences there are between the two modes are relatively insignificant. But see *id.* at 223: "Strict textualism and intensionalism are not synergistic, but rather mutually antagonistic approaches to interpretation."

16. Consider the origins of the impairment of contracts clause (U.S. CONST. art. I, § 9, cl. 1) and the treatment of those origins in *Home Building and Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

Third, what is the role in such a hypothetical question and answer technique of a normative "mistake" by the author of the command? Suppose we believe that the conception of justice held by the Framers of the fourteenth amendment, which conception they sought to embody in that amendment, is inferior to, say, that of John Rawls. Moreover, suppose we believe that upon reading Rawls' arguments, the Framers would have been convinced by them and would have given the fourteenth amendment a distinctly Rawlsian flavor. If we hold those beliefs, then are we properly "interpreting" the fourteenth amendment when we in fact *do* give it a Rawlsian flavor?¹⁷

Another way of looking at the second and third questions regarding factual and normative mistakes is to view them as asking, "At what level of generality of purpose do we interpret what the Framers of the Constitution have done?" At the highest level of generality, the Framers intended "to promote wise and just government." At that level of generality of interpretation, nothing the Framers did can be deemed to have been mistaken, since it is never a "mistake" to promote wise and just government. By the same token, however, there is little utility in having a written constitution and in knowing who the Framers were and their circumstances if whatever is written is "interpreted" as "promote wise and just government (as *you*, the *interpreter*, conceive of it)." On the other hand, if we choose a very low level of generality at which to express the Framers' purposes, one that is about as specific as the words' denotations for the Framers, we may have to give effect to some very silly and obvious mistakes.¹⁸

17. There has been a lively debate over interpreting the Constitution to embody the moral theory of John Rawls, John Stuart Mill, or one's alternative philosophical favorite when it is clear that the Framers would not have endorsed the views of those philosophers, *at least without argument*. R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, 130-49 (1977); D. RICHARDS, *THE MORAL CRITICISM OF LAW* 39-56 (1977). *See also* Greenawalt, *Comments to Chapters 2 and 3*, in *THE JUDICIARY IN A DEMOCRATIC SOCIETY* 86, 89-90 (L. Theberge ed. 1979). *But see* Bayles, *Morality and the Constitution*, 1978 ARIZ. ST. L.J. 561; Gerety, *Pornography and Violence*, 40 U. PITT. L. REV. 627, 643 (1979); Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L. L. REV. 117 (1978); Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1037-41 (1977).

18. *See generally* W. BISHIN & C. STONE, *LAW, LANGUAGE AND ETHICS* 502-38 (1972); P. BREST, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 15-44, 103-14, 145-69 (1975); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 209-11, 216-17, 220-21 (esp. n.64)(1980). The works just cited contain many useful illustrations of the problem of determining the proper level of generality of "intent" for interpretation. I often illustrate the problem in class through such commonplace examples concerning interpreting directives as the following:

You give a friend your check book and tell her that you would like her to go out and buy you a jar of curry powder, as you have your heart set on curry for your dinner tonight. She returns late in the afternoon with a jar of curry powder, but you notice that the check she wrote was for \$3,000! After you gain control of yourself, you ask her how she spent \$3,000 of your money. She replies that there is a shortage of curry powder, the jar she bought was the last one in stock in town, and the grocer refused to sell it for less than \$3,000. Because you said you had your heart set on curry, and because you did have \$3,000 in the bank, she bought the jar.

The alternative version of the story has your friend returning with alfalfa sprouts. You ask her why she bought sprouts and not curry powder, and she replies that although your specific intent was to have curry, your more general intent was to have a good meal, and your even more general intent was to get pleasure from life; and if you begin now cultivating a taste for alfalfa sprouts, your life will ultimately contain more pleasure.

In both cases I claim that you have been misinterpreted. In the first version, the alternative account is to say your friend properly interpreted your directive but unreasonably adhered to it. I

Fourth, what is the role of the various "canons" of interpretation? Are they merely rules of thumb for interpretation, or are they "legal" rules prescribing the form commands must take to have legal effect? When the interpreter restricts his interpretation to the words' dictionary meanings, or to their meanings in English, or says such things as, "Had the Framers intended the fourteenth amendment to embody no more than the 1866 Civil Rights Act, they knew how to express such an intent,"¹⁹ is the interpreter employing an evidentiary presumption, or is he employing some sort of meta-constitutional norm, similar to, say, the parol evidence rule? Whatever he is doing, once the "canons" are recognized as the proper canons, they have a further influence on interpretation because they indicate to the speaker how his audience can be expected to interpret him, which in turn influences how the audience interprets the speaker, which in turn influences the speaker, *ad infinitum*.²⁰

Fifth, how does the authority relationship between the author of the command and his audience affect, if at all, interpretation? Does proper interpretation remain a constant as we move from a court's interpretation of a constitutional provision to a court's interpretation of a statute to a trustee's interpretation of a trust document, and so on, or is interpretation, at least when normative provisions are being interpreted, highly sensitive to the moral/legal aspects of the relationship between the author and the interpreter?

Along these lines, I am inclined to suggest that it is a mistake to think of interpretation as one thing, as a constant in whatever situation it figures. I believe we will find it much more fruitful to view interpretation as a family of distinct though related enterprises, with each enterprise representing a different hypothetical question addressed to the author of the command in question. Viewing interpretation in this manner will in turn lead us to ask, not what is *the* hypothetical question to ask to interpret *any* command, but rather what is *the* hypothetical question to ask to interpret *this type* of command. The answer to the latter question will be a moral/political answer in that one's chosen moral theory will support certain political and legal arrangements, which will in turn be defined in part by how various instruments—constitutional provisions, statutes, contracts, wills, and so forth—should be inter-

believe the alternative account is incorrect, though I can offer no criteria for distinguishing in brightline fashion misinterpretation from unreasonable adherence to a correct interpretation.

In the second version, however reasonable on paternalistic grounds is your friend's behavior, it is not reasonable as an interpretation of your directive.

It may be impossible to improve upon Wittgenstein's classic illustration of the problem:

Someone says to me: "Show the children a game." I teach them gaming with dice, and the other says, "I didn't mean that sort of game." Must the exclusion of the game with dice have come before his mind when he gave me the order?

L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 33e (1953).

19. See ELY, *supra* note 1, at 30, 198-200; Bennett, "Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory, 67 CAL. L. REV. 1049, 1090 (1979).

20. Paul Brest has some interesting things to say about the role of the author's intent with respect to the canons of interpretation. Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 212, 215-16, 220 (1980).

preted. Thus, one's moral theory may support political/legal principles that dictate interpreting constitutional provisions in terms of a hypothetical question addressed to the Framers that "corrects" totally or to some extent their empirical and moral "mistakes." On the other hand, one's moral theory may dictate a more confining principle of statutory interpretation, such as a hypothetical question of the type that basically requires the interpreter to live with, and the legislature to rectify, the legislature's mistakes. In other words, there may be in one's moral theory a stronger principle of legislative supremacy than of Framer supremacy. And when one moves to contracts or wills, where the autonomy of private individuals enters, perhaps asking a still different hypothetical question of the party being interpreted is the warranted form of interpretation.²¹

Finally, how are all these questions about interpretation affected when we move from interpreting the command of a single person to interpreting the command of a collective body? Do we have at bottom any concept of interpretation of collectively authored commands?²²

The modern debate in constitutional theory over "interpretivism" versus "noninterpretivism," and whether "noninterpretivism" is really "interpretivist" because embodied in certain open-ended constitutional provisions, already presupposes that we have a relatively clear understanding of what interpreting a constitution is, when in fact it seems obvious that we do not.

2. *Noninterpretivism, Neo-Interpretivism, Quasi-Interpretivism, and Judicial Review*

Much of the modern debate has assumed that courts should overturn the actions of the democratic institutions of government only when the actions contravene a constitutional command, *properly interpreted*. Thus, one can see the relevance of the discussion in the previous section. Many of the debate's participants, however, have denied that courts act illegitimately in invalidating the actions of the other governmental branches on the basis of norms not discovered through "interpretation." There are three basic positions among the latter theorists, theorists who adopt "noninterpretivism."

The form of noninterpretivism that is closest to pure interpretivism, a form that I label "neo-interpretivism," is represented by Ely. The neo-

21. Paul Brest, the only modern theorist to deal with the hypothetical-question approach to interpretation, ultimately takes a noninterpretivist position with respect to constitutional "interpretation," and does not reach any conclusions whatsoever regarding interpretation of other legal instruments. Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980). Ronald Dworkin suggests a view of statutory interpretation that appears to walk a problematic tightrope between hypothetical-question interpretation and noninterpretivism. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 107-10 (1977); Dworkin, *How to Read the Civil Rights Act*, N.Y. REV. OF BOOKS, Dec. 20, 1979, at 37.

22. See Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 212-15 (1980); Dworkin, *How to Read the Civil Rights Act*, N.Y. REV. OF BOOKS, Dec. 20, 1979, at 37. In constitutional interpretation there is the additional problem of determining which collectivities—the sponsors of provisions, influential speakers, committees, the convention, the ratifying state legislatures, the state citizens, etc.—should be deemed most important. Of course, even in interpreting statutes, the same kind of problem is present. For instance, what effect should the chief executive's intent have on proper interpretation of a statute?

interpretivist holds that some of the constitutional commands, *properly interpreted*, are empty vessels and delegate to the courts the job of supplying the values required to flesh out the commands. Moreover, the neo-interpretivist holds that the proper source for the requisite values is the Constitution itself, or rather those values that lie behind and explain the more specific values that interpretivism reveals. Thus, Ely discovers the value of "broad participation in the processes and distributions of government"²³ to be the root value behind many specific constitutional commands and structures, and he deems this value to be the proper value for fleshing out noninterpretivist provisions such as the equal protection and privileges and immunities clauses and the ninth amendment.²⁴ The reason neo-interpretivism is noninterpretivist is that *Ely cannot cite any provision in the Constitution that, in cases where Ely's conception of "broad participation in the processes . . . of government" conflicts with the democratic institutions' definition of such participation, justifies favoring Ely's conception.*²⁵

The form of noninterpretivism that I label "quasi-interpretivism" is identical to neo-interpretivism, except that the values necessary to flesh out the noninterpretive constitutional commands need not be tied closely to values explicitly recognized in the interpretive provisions.²⁶ Quasi-interpretivism, like neo-interpretivism, is thus noninterpretivist with respect to substantive values, but interpretivist with respect to the authority to seek out noninterpretivist values and with respect to having a particular provision or provisions in the Constitution on which to hang all holdings of unconstitutionality.²⁷

Pure noninterpretivism is a position that posits judicial authority to invalidate the actions of democratic institutions based on norms that may be clearly extraconstitutional.²⁸ For the noninterpretivist there is an unwritten "constitution" behind the written one, a "constitution" that may contain not only norms substantively restricting the democratic branches, but also norms pertaining to judicial review, such as norms governing *stare decisis* in constitutional cases, norms governing how the written Constitution should be "interpreted,"²⁹ norms governing the relation of the written Constitution to the unwritten one, and norms governing the authority of the democratic branches to overrule the courts.

23. ELY, *supra* note 1, at 87.

24. ELY, *supra* note 1, at 73-104. See also Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659, 667-69.

25. M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (draft 1980).

26. My neo-interpretivism and quasi-interpretivism are similar to what Paul Brest calls "moderate originalism." Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204-05 (1980).

27. Laurence Tribe is a good example of one who ties extraconstitutional values to constitutional provisions that he believes function as invitations to apply such values. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978). See also B. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980).

28. Paul Brest labels pure noninterpretivism "nonoriginalism." Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 205 (1980).

29. I place the scare quotes here to flag the issue of whether interpretation properly so-called can be governed by ethical or legal norms as opposed to ethically or legally-neutral craft norms.

Michael Perry has recently produced a fairly thorough version of pure noninterpretivism in which the courts have authority to invalidate actions of the democratic branches on purely moral grounds not embodied in any constitutional provision, properly interpreted.³⁰ Perry's notion of interpretation is similar to Berger's, that is, one based on the model of the imagined answer the Framers would give in the case at hand if they were not made aware of their factual and ethical errors. Interpretation so defined can account for only a limited number of the modern individual rights decisions. That does not mean, however, that for Perry those decisions are unjustified. If the decisions reflect the society's evolving morality better than do the governmental actions the decisions overturn, then they are justified. Ultimately, the test of the authority of these noninterpretivist decisions is how Congress responds to them. If Congress deprives the federal courts of jurisdiction to consider future cases of that kind, then the Court will have presumably misgauged society's morality.³¹ If the decisions withstand such a Congressional attempt at limitation, then they are authoritative.³²

Perry's version of noninterpretivism is actually a very moderate one. The interpretivist places the authority of the written Constitution, properly interpreted, above the authority of the democratic branches, and the authority of those branches above that of the courts, except insofar as the courts are merely interpreting the Constitution. (To be accurate, most interpretivists, accepting *Marbury v. Madison*,³³ rank the authority of the courts, when they are attempting in good faith to interpret the Constitution, above the written Constitution. Indeed, most interpretivists would probably also rank the principles of *stare decisis*³⁴ and necessity occasioned by emergency above the written Constitution.) Noninterpretivists like Perry also place the authority of the written Constitution, properly interpreted, and the authority of the courts acting in the interpretivist mode (as well as principles of *stare decisis* and necessity) first.³⁵ But, for Perry, unlike the interpretivists, below this level of authority is the authority of the courts acting in pursuance of society's evolving morality,³⁶ unless checked by the authority of Congress acting to limit the

30. M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (draft 1980).

31. See U.S. CONST., art. III, § 2, cl. 2: "[T]he Supreme Court shall have appellate Jurisdiction . . . with such Exceptions, and under such Regulations as Congress shall make."

32. See also Perry, *Book Review*, 78 COLUM. L. REV. 685, 697-703 (1978).

33. 5 U.S. (1 Cranch) 137 (1803).

34. See Bennett, "Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory, 67 CAL. L. REV. 1049, 1092 (1979); Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1050-62 (1977).

35. There is a potential problem in placing the authority of the written Constitution above that of noninterpretivist decisions. Suppose the federal courts and/or Congress come up with a noninterpretivist "constitutional" standard to protect individuals against their state governments. What effect should the tenth amendment have on the legitimacy of such a standard on the view considered here? See also, Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 235-36 (1980).

36. There are really two versions of this form of noninterpretivism. In the first, the judge attempts to divine society's evolving morality. In the second, the judge attempts to divine true moral principles and hence influence the direction in which society's morality evolves. In the first, the judge must distinguish his moral views *qua* judge from his moral views *qua* individual. In the second, he need not. Noninterpretivists are often

jurisdiction of the federal courts. The authority of the democratic branches acting in their normal mode is subordinate to the authority of the courts acting in this noninterpretivist mode. The more extreme forms of noninterpretivism would place judicial authority to implement true moral principles³⁷ above the authority of the Congress, which would have no power constitutionally to limit the courts' jurisdiction over noninterpretivist cases on grounds it disapproved of noninterpretivist decisions. Moreover, the extreme noninterpretivist might very well place—and indeed would seem logically compelled to place—the authority of noninterpretive decisions above that of interpretive ones.³⁸ (After all, the same reasons for placing the judicial implementation of true moral principles above the authority of Congress hold for placing the judicial implementation of such principles above the authority of the interpretivist Constitution.) The extreme forms of noninterpretivism are what Berger says we presently have.

B. Rules and Principles in the Definition of Constitutional Rights

Assume that we know how properly to interpret constitutional provisions. At this point in the discussion I wish to introduce a philosophical distinction that bears directly upon constitutional theory, a distinction between two types of norms. I will label the distinction the "rule/principle" distinction, but this basic distinction between norm-types could as well be labelled "formal/informal," "legal/equitable," "mechanical/flexible," or "opaque/nonopaque." A formal, mechanical, opaque rule is an ideal type of norm that contrasts with another ideal type, the nonformal, flexible, transparent principle.³⁹

ambiguous regarding what version they are adopting. See Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 227 (1980) ("[T]he practice of constitutional adjudication should enforce those . . . values which are fundamental to our society."); R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, 115-30, 160-63 (1977). See also Alexander & Bayles, *Hercules or Proteus? The Many Theses of Ronald Dworkin*, 5 SOCIAL THEORY & PRACTICE 267, 296-97 n.27 (1980). Other noninterpretivists appear clearly to opt for the first version. See, e.g., Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1185 (1977) ("constitutional law . . . understood as the expression of evolving social norms."); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 244 (1973) ("Judicial reasoning . . . must proceed from society's set of moral principles. . . .") (One should note the problem that a noninterpretivist judge will have in phrasing a holding of "unconstitutionality," given that no provision of the Constitution itself determines the outcome).

37. In the more extreme forms of noninterpretivism, those impervious to democratic overrule of the courts, it makes little sense for the judge to decide on the basis of society's morality rather than on the basis of what the judge believes is true morality. See Alexander & Bayles, *Hercules or Proteus? The Many Theses of Ronald Dworkin*, 5 SOCIAL THEORY & PRACTICE 267, 296-97 n.27 (1980).

38. Several noninterpretivists adopt the position that the interpretivists' Constitution functions as only the beginning point in a line of precedent that may evolve into pure noninterpretivism. See Bennett, "Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory, 67 CAL. L. REV. 1049, 1094 (1979); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 229, 234 (1980); Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1054-57 (1977).

39. My distinction between rules and principles is not identical to Ronald Dworkin's distinction between the two. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, 22-28 (1977). My "principles" are ultimate moral standards, though some, like the act-utilitarian principle, would be rules according to Dworkin's analysis. My "rules" are standards that are intermediate and instrumental to ultimate moral concerns and that are "opaque"—that is, they preclude consideration of factors that the ultimate moral principles that they are designed to effectuate would deem relevant. The opacity of rules is morally functional because of the difficulties

Correct moral principles are the norms that would be applied by an omniscient, morally motivated decisionmaker. But correct moral principles in the hands of intellectually and morally fallible human decisionmakers may produce outcomes that are morally inferior to the outcomes that would be produced were the decisionmakers guided by rules that are more mechanical and less fact-sensitive than the correct principles. The reason is that mechanical rules are easier to apply, and others' applications of them are easier to predict and monitor.⁴⁰

Arguably, it is theoretically possible, perhaps even common, to have a case in which the decisionmaker correctly believes he can produce a morally superior outcome by ignoring the rule and deciding directly under the proper moral principles, but in which he also believes that the present rule is optimal and that a publicizable exception to the rule for this kind of case cannot be carved out without producing morally worse results than the exceptionless rule produces. In such a case, the decisionmaker is torn between the optimal rule and the optimal result.⁴¹

people have in making, predicting, coordinating, and monitoring moral decisions directly under ultimate moral principles that require consideration of an infinite number of factors. For excellent discussions of opacity, see J. RAZ, *THE AUTHORITY OF LAW* 21-33 (1979) ("exclusionary reasons"); Powers, *Structural Aspects of the Impact of Law on Moral Duty Within Utilitarianism and Social Contract Theory*, 26 U.C.L.A. L. REV. 1263 (1979); Powers, *Formalism and Nonformalism in Choice of Law Methodology*, 52 WASH. L. REV. 27, 28-33 (1976). Dworkin's principles function like those of moral intuitionists. See J. RAWLS, *A THEORY OF JUSTICE* 34-40 (1971).

40. For discussion of the role of opaque rules in consequentialist moral systems, see D. LYONS, *THE FORMS AND LIMITS OF UTILITARIANISM* 119-60 (1965). See also D. HODGSON, *THE CONSEQUENCES OF UTILITARIANISM* 9-37, 63-110, 166-81 (1967); Harsanyi, *Rule Utilitarianism, Rights, Obligations and the Theory of Rational Behavior*, 12 *THEORY AND DECISION* 115 (1980); Lyons, *Utility as a Possible Ground of Rights*, 14 *NOUS* 8 (1980); Ralls, *Rational Morality for Empirical Man*, 44 *PHIL.* 205 (1969); Silverstein, *Utilitarianism and Group Coordination*, 13 *NOUS* 335 (1979). And see Parfit, *Is Common-Sense Morality Self-Defeating?*, 76 *J. PHIL.* 533 (1979). For discussion of opaque rules in legal systems, see J. RAZ, *THE AUTHORITY OF LAW* 21-33 (1979); J. REIMAN, *IN DEFENSE OF POLITICAL PHILOSOPHY* 24-26, 28, 34 (1972); R. WASSERSTROM, *THE JUDICIAL DECISION* 118-71 (1961); Bernstein, *Legal Utilitarianism*, 89 *ETHICS* 127 (1979); Farrell, *Dealing with Injustice in a Reasonably Just Society: Some Observations on Rawls' Theory of Political Duty*, in *JOHN RAWLS' THEORY OF SOCIAL JUSTICE* 187 (H. Blocker & E. Smith eds. 1980); Goldman, *The Obligation to Obey Law*, 6 *SOCIAL THEORY & PRACTICE* 13 (1980); Kennedy, *Form and Substance in Private Law Adjudication*, 89 *HARV. L. REV.* 1685 (1976); Kennedy, *Legal Formality*, 2 *J. LEGAL STUD.* 351 (1973); Nonet, *The Legitimation of Purposive Decisions*, 68 *CAL. L. REV.* 263 (1980); Powers, *Structural Aspects of the Impact of Law on Moral Duty Within Utilitarianism and Social Contract Theory*, 26 U.C.L.A. L. REV. 1263 (1979); Powers, *Formalism and Nonformalism in Choice of Law Methodology*, 52 WASH. L. REV. 27, 28-33 (1976).

41. Rule-consequentialists, such as rule-utilitarians, argue that the optimal rules should be followed in such a case. The coherence of such a position is questioned by many philosophers. See D. HODGSON, *THE CONSEQUENCES OF UTILITARIANISM* 9-37, 63-110, 166-81 (1967); D. LYONS, *THE FORMS AND LIMITS OF UTILITARIANISM* 119-60 (1965); J. RAZ, *THE AUTHORITY OF LAW* 233-49 (1979); J. REIMAN, *IN DEFENSE OF POLITICAL PHILOSOPHY* 34-38 (1972); R. SARTORIUS, *INDIVIDUAL CONDUCT AND SOCIAL NORMS* 51-80 (1975). The more common view is that the decisionmaker should attempt to produce the morally superior outcome, which may involve deviating from the rule but lying about the deviation in order to preserve the rule. The common view runs into difficulty because it must endorse an instrumental view of punishment and reward, of blame and praise, and of publicizing the moral bases of one's actions. Whether it is coherent to "blame" actions one believes are morally laudable and whether one can "accept" a moral principle that he cannot publicly endorse (and indeed may have to program himself not to act upon in the name of acting upon that principle) are very problematic. See, e.g., Williams, *A Critique of Utilitarianism*, in J. SMART & B. WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 118-25 (1973); Devine, *The Conscious Acceptance of Guilt in the Necessary Murder*, 89 *ETHICS* 221 (1979); Goldman, *Can a Utilitarian's Support of Nonutilitarian Rules Vindicate Utilitarianism?*, 4 *SOCIAL THEORY & PRACTICE* 333 (1977); Piper, *Utility, Publicity, and Manipulation*, 88 *ETHICS* 189 (1978); Ralls, *Rational Morality for Empirical Man*, 44 *PHIL.* 205 (1969).

Now there are three possible ways, relevant to the rule/principle distinction, that proper interpretation might reveal how a constitutional provision should be read. First, proper interpretation might reveal that a particular constitutional provision is a mechanical rule, a rule no doubt believed instrumental to some further moral end, but a rule nonetheless.⁴²

Second, proper interpretation might reveal that a particular constitutional provision is an ultimate moral principle. The principle might best be realized through the development of some intermediate, opaque, formal rules, or it might best be realized through direct, case-by-case application.⁴³ But however it might be best realized, the ultimate principle is the true meaning of the constitutional provision.

Third, proper interpretation might reveal that certain constitutional provisions operate as alternative lenses on a smaller set of ultimate moral principles. Thus, there may be a single concept of fairness in the distribution of property that lies behind the takings clause, the obligations of contract clause, the due process clause, and the equal protection clause, though the Framers may have thought that there were several distinct types of fairness, each corresponding to one of the clauses.⁴⁴ Again, the single concept of fairness might best be realized through development of a set of rules, but the rules would not necessarily correspond in number or content to the several provisions that invoke the ultimate concept.

C. The Relation Among Judicial Review, Interpretation, and the Rule/Principle Distinction

Those for whom democratic values rank quite high may, of course, reject *Marbury v. Madison* or even constitutionalism. But they may take the less extreme position that the Constitution, as the embodiment of the commands of the Framers, is supreme over democratic institutions, but only to the extent that it contains clear rules and not vague principles. Clear rules can be trusted to nondemocratic institutions because their application can be easily monitored by the people. Of course, the clear rules may be both morally obnoxious and yet for some reason impossible to amend under the rules governing

42. The reasoning behind such a rule might have gone as follows:

We, the Framers, know that certain reasons—for example, subjugating blacks—will almost never be necessary intermediate reasons to the permissible or required ultimate governmental reasons for action. If we absolutely proscribe such reasons, we will impose the cost of obstructing on rare occasion some otherwise necessary or permissible government action. On the other hand, if we were to proscribe such reasons only when they were inconsistent with the required or permissible ultimate ones, government would act on such reasons more frequently than warranted, urging in good faith or in bad faith that its ultimate reasons were proper, and the courts would frequently fail to detect the violations. The costs of this option would be greater than the costs of the absolute proscription.

43. For discussion of the judicial decision whether to implement ultimate constitutional principles directly or through intermediate, mechanical rules, see P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 994–1003 (1975). See also Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 30, 33–34 (1975).

44. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW 463 (1978).

amendments, in which case a crisis portending a constitutional revolution is at hand. Nevertheless, a set of reasonably acceptable and clear rules applied by courts to check democratic institutions may be thought superior to democracy without such constitutional restraints.⁴⁵

On the other hand, if the Constitution embodies, not rules, but moral principles, then those who esteem democracy might totally deny the authority of the Constitution and of judicial review in pursuance of constitutional norms. Their argument would be that *if the Framers' moral principles are erroneous*, democratic institutions are checked without either the virtue of substantive moral warrant or the virtue of clear and predictable rules. All of the Constitution's authority must therefore rest on the inadequate personal authority of the Framers. In short, if the Constitution embodies incorrect moral principles, judicial noninterpretivism is preferable to judicial interpretivism. *If, on the other hand, the Constitution embodies correct moral principles*, then, while judicial checking of democratic institutions is not in pursuance of incorrect moral principles, it still lacks the virtue of action in pursuance of clear and predictable rules. In short, if the Constitution embodies correct moral principles, judicial interpretivism adds nothing to judicial noninterpretivism. And a democrat may cogently reject judicial noninterpretivism, that is, judicial authority to check the democratic branches based solely on the judiciary's particular conception of correct moral principles.

From the above analysis it is easy to see why constitutional theories should gravitate toward interpreting constitutional provisions as clear, mechanical rules⁴⁶ or toward "interpreting" them as correct moral principles. Moreover, the latter type of "interpretation" leads inevitably towards noninterpretivism of the Perry variety—the written, interpretivist Constitution, or the interpretivist clauses of the Constitution (the "rules"), alongside the noninterpretivist moral principles (perhaps traceable to particular clauses).⁴⁷ In Perry's scheme, the written, interpretivist Constitution is supreme over noninterpretivist standards. The logic of noninterpretivism, however, inevitably erodes the authority of conflicting constitutional rules, so that ultimately

45. Even if there were no judicial review of legislation, an interpretivist legislator would still consider the meaning of constitutional provisions to be important in fulfilling his or her obligations. See Alexander, *Book Review*, 29 STAN. L. REV. 1299, 1305–06 (1977); Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975).

46. As Justice Black interpreted the first amendment. See, e.g., *Barenblatt v. United States*, 360 U.S. 109, 140–44 (1959) (Black, J., dissenting).

47. The Constitution is commonly read as containing two types of provisions: narrow, rule-like, interpretivist provisions, and broad, nonformal, neo or quasi-interpretivist ones. See P. BREST, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 114–18 (1975).

Logically, tracing an ultimate moral principle to some clause in the Constitution, properly interpreted, adds nothing to the principle's authority. Others have noted how the authority of the Framers' specific conceptions is eroded when a provision is interpreted as a principle rather than as a rule. See, e.g., Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 231–32 (1980); Greenawalt, *Comments to Chapters 2 and 3*, in *THE JUDICIARY IN A DEMOCRATIC SOCIETY* 86, 89–90 (L. Theberge ed. 1979). Cf. B. GABIN, *JUDICIAL REVIEW AND THE REASONABLE DOUBT TEST* (1980) (the proper role of the courts is to overturn only that legislation that is unconstitutional beyond a reasonable doubt—a conception of judicial review that would virtually restrict it to constitutional rules, not principles).

all theories gravitate toward rule-oriented interpretivist theories for those, like Berger or Justice Black, who prefer democratic institutions to courts, or toward pure judicial supremacy under correct moral principles, perhaps with a check through amendment or curtailment of jurisdiction.⁴⁸ Theories that attempt a middle course, that treat constitutional provisions as principles, not as mechanical rules, but not necessarily the best principles, ultimately founder in their attempt to justify the authority of the Constitution.⁴⁹

III. THEORIES OF THE EQUAL PROTECTION CLAUSE

I now wish to shift the focus from constitutional interpretation and the judicial role in general to the equal protection clause in particular. I shall not dwell on the clause's legislative history, a subject well canvassed elsewhere.⁵⁰ Instead, I shall describe the various types of modern theories of equal protection and point out the problems each encounters, the relation of equal protection under each theory to the rest of the Constitution, and the roles of the judiciary and the nonjudicial branches that seem most appropriate for each theory.

A. *The Distinction Between Nonoptional and Optional Governmental Action*

To begin to understand modern theories of equal protection, one must distinguish between those laws and other governmental acts⁵¹ that are either mandated or forbidden by the Constitution—what I shall call “nonoptional rules”—and those laws and other governmental acts that are neither mandated nor forbidden by the Constitution—what I shall call “optional rules.” A constitutional theorist may decide, for example, that the government has a constitutional obligation to hold elections every four years and a constitutional obligation not to allow public officials to recover damages for defamation in the absence of malice. The theorist may also decide that the government is constitutionally *permitted*, but *not* constitutionally *obligated*, to provide welfare for the poor, or to require proof beyond the “clear and convincing” level to commit the insane.

What is crucial to recognize is that deeming a governmental rule “optional” is not to deny that the benefit or burden it allocates is subject to

48. The latter course appears to be the one chosen by Brest and Perry. See M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (draft 1980); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

49. I have elsewhere criticized Ronald Dworkin's legal theory on the ground that he requires judges to employ standards that are neither clear and mechanical nor morally preferable. Alexander & Bayles, *Hercules or Proteus? The Many Theses of Ronald Dworkin*, 5 SOCIAL THEORY AND PRACTICE 267, 271-78 (1980). See also Bayles, *Morality and the Constitution*, 1978 ARIZ. ST. L.J. 561, 565-66; Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 231-32 (1980); Ladenson, *Freedom of the Press: A Jurisprudential Inquiry*, 6 SOCIAL THEORY & PRACTICE 163, 166-67 (1980). But see Westen & Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311, 336 (1980).

50. See, e.g., R. BERGER, *GOVERNMENT BY JUDICIARY* (1977); Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U.L. REV. 651 (1979).

51. Hereafter I shall refer to all governmental decisions—whether they be statutes, published or unpublished administrative rules, or *ad hoc* decisions by administrators or courts—as “rules.”

constitutional restrictions. Indeed, all the modern theorists—and perhaps more importantly, the Supreme Court—maintain that most if not all of the concern of equal protection, and much of the concern of the speech and religion clauses (and their fourteenth amendment umbrella, due process), procedural due process, the interstate privileges and immunities clause, the dormant commerce clause, and perhaps even the takings clause and the bill of attainder clause, lies in the area of optional government rules.

Just how can a benefit or burden be constitutionally optional in one sense and yet a rule allocating it be constitutionally forbidden? How, for example, can one sensibly maintain that as a constitutional matter the government need not give welfare to anyone, but that it is constitutionally forbidden to give more welfare to needy whites than to equally needy blacks?

Most of the knottiest problems in modern constitutional law implicate this general question. Why may government forbid all speech delivered at a certain time or a certain place or in a certain manner, but may not forbid only some speech and permit all other speech so delivered?⁵² Why may government completely eliminate a public employment position, but may not condition such employment on the absence of procedural protection,⁵³ on political affiliation,⁵⁴ or on citizenship?⁵⁵ Does government violate the Constitution when it provides health benefits, which it need not provide anyone, to enable women to choose childbirth—a choice that government must permit—but refuses to provide health benefits to enable women to choose abortion—equal-

52. Compare *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); and *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); with *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); and *Greer v. Spock*, 424 U.S. 828 (1976). See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, at 672-74, 681-82, 692-93; Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727 (1980); Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978). Favoring the "press" over the public, or certain members of the press over other members, when access to a public event or information must be restricted, implicates the same general issue.

53. Compare *Perry v. Sinderman*, 408 U.S. 593 (1972), with *Bishop v. Wood*, 426 U.S. 341 (1976).

54. See *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980).

In the *Branti* case, Justice Powell, in dissent, raised the interesting point that had the public employee (a deputy public defender) been an elected rather than an appointed official, his political affiliation could constitutionally have been considered by the electorate. *Id.* at 1302. There are three possible positions on this point. First, Justice Powell may be correct, in which case to justify *Branti* one must come up with a theory that explains why the electorate may consider a candidate's party affiliation and perhaps her race, gender, and religion, but an administrator, herself an elected official, may not consider those factors in making an appointment. Second, Justice Powell may be incorrect, and the electorate may be constitutionally forbidden to consider political affiliation in selecting nonpolicymaking employees, but the courts have no power to inquire into the electorate's selection criteria. Precedent appears to suggest, however, that courts may look at voter motivation to invalidate election results. See, e.g., *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Hunter v. Erickson*, 393 U.S. 385 (1969). Third, Justice Powell may be incorrect, and were the courts to discover that a nonpolicymaking official was not elected because of her political affiliation, they would invalidate the election. This seems like an extreme position, inconsistent with our well-settled belief that political affiliation is a proper factor to consider in voting; but it would explain the Court's previous extreme position of, in effect, outlawing racial political parties. See *Terry v. Adams*, 345 U.S. 461 (1953).

55. See *Sugarman v. Dougall*, 413 U.S. 634 (1973). But see *Foley v. Connelie*, 435 U.S. 291 (1978); *Ambach v. Norwick*, 441 U.S. 68 (1979). The theory presently in vogue for analyzing state discriminations against aliens; is federal preemption, not equal protection. See Note, *The Equal Treatment of Aliens; Preemption of Equal Protection?*, 31 STAN. L. REV. 1069 (1979).

ly a choice that government must permit?⁵⁶ Does government violate the Constitution by favoring certain lifestyles through awards of constitutionally optional benefits when it cannot constitutionally proscribe the lifestyles not so favored?⁵⁷ Does government violate the Constitution when it allows a criminal defendant to plead a constitutionally optional defense but does not require the government to disprove it beyond a reasonable doubt?⁵⁸ And if government must provide *equal* public education, even if it is constitutionally permitted to provide *no* public education, does *equal* mean *equal inputs* of dollars, without regard to language handicaps, physical handicaps, psychological handicaps, or the general educational handicaps of a poor genetic endowment or educational environment, or does *equal* mean *equal educational achievement (equal outputs)*? Any constitutional theorist who purports to remain faithful to constitutional practice must explain this particular phenomenon of a governmental benefit's (or burden's) being constitutionally optional and yet not allocable on the basis of just any reason the government prefers. Any theory that rejects the idea of constitutionally optional governmental benefits, or that accepts the idea of such benefits but rejects constitutional limitations on them, will be strongly revisionist.

B. *Equal Protection Methodology*

In the following pages I am going to examine the methodology that is logically implied by two views of equal protection: the view that equal protection is primarily concerned with *nonoptional* governmental benefits and burdens, and the view that equal protection is primarily concerned with *optional* governmental benefits and burdens. In so doing I hope to clarify to some extent the proper roles in equal protection methodology of governmental motives, effects, fundamental interests, suspect classifications, means/ends fit, less restrictive alternatives, and the legitimacy and compellingness of governmental interests. I also hope to show why the equal protection assessment of governmental allocations of optional benefits and burdens tends inevitably to get entangled with, and perhaps ultimately to collapse into, due process assessments of nonoptional allocations of those benefits and burdens.

1. *With Respect to Nonoptional Benefits (and Burdens)*

If we are dealing with a governmental rule that is constitutionally mandated or forbidden—that is, a rule that is not constitutionally optional—then

56. See *Maier v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 100 S. Ct. 2701 (1980). On the question of whether welfare is a constitutionally optional benefit, see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 918–20 (1978); *Dandridge v. Williams*, 397 U.S. 471 (1970); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969).

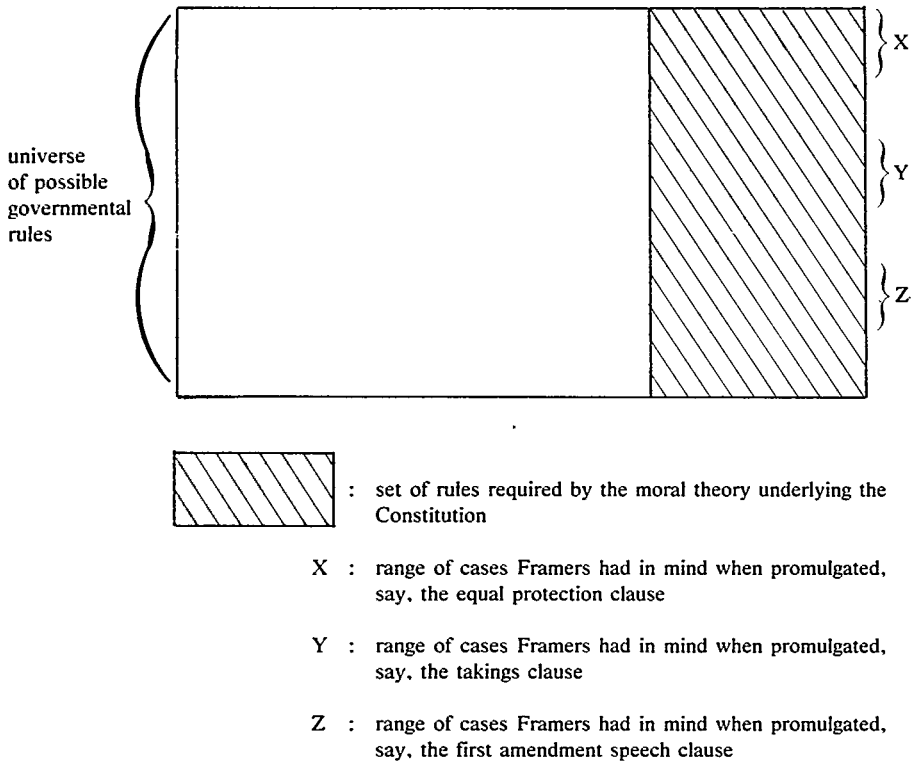
57. Compare *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), with *U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973). Consider in this regard ideological speech by the government and governmental endorsement of certain values in the curriculum of public schools. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 588–91 (1978); Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CAL. L. REV. 1104 (1979); Shiffrin, *Government Speech*, 27 U.C.L.A. L. REV. 565 (1980); Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863 (1979); Note, *The Constitutionality of Municipal Advocacy in State-Wide Referendum Campaigns*, 93 HARV. L. REV. 535 (1980); Note, *Unconstitutional Government Speech*, 15 SAN DIEGO L. REV. 815 (1978).

58. See *Mullaney v. Wilbur*, 421 U.S. 684 (1975). See also *Patterson v. New York*, 432 U.S. 197 (1977).

we will be totally unconcerned with the government's reasons for not acting (if action is mandated) or acting (if action is forbidden). Results, not intentions, will be all that matter.⁵⁹

Moreover, if the Constitution mandates one complete set of governmental rules and leaves no room for choice, the equal protection portion of the Constitution would be distinguishable from, say, the substantive due process portion in the latter's speech, religion, and autonomy modes only with respect to the types of rules mandated by each portion. For instance, due process might protect the right to choose an abortion; equal protection might protect the right to minimum income, health care, education, and housing as well as the right to equal apportionment in the constitutionally mandated elections. (By hypothesis, elections would be either mandated or forbidden.) Every possible rule that government might enact would be either mandated or forbidden under some portion of the Constitution. Let us call such a view of the Constitution and equal protection the nonoptional view. It is represented by Diagram A:

Diagram A



59. When I say that reasons are irrelevant in the area of constitutionally nonoptional rules, I do not mean to suggest that the nonoptionality of such rules renders their performance or nonperformance mandatory regardless of circumstances. A particular rule might be constitutionally required in circumstances C and constitutionally forbidden in all other circumstances. In that sense the rule's constitutionality is dependent upon "reasons" in an objective sense, but the government's actual reasons are completely irrelevant.

The first thing to note about the nonoptional view of equal protection is how foreign it seems to modern equal protection jurisprudence. In a true equal protection case it is thought that the government may extend the benefit or burden either to no one or to everyone, but that equal protection problems arise when government extends the benefit or burden to some but not all. In other words, a governmental option is assumed.

One could, of course, explain the *appearance* of optionality in equal protection jurisprudence by notions of institutional deference—that is, that the courts are often institutionally ill-equipped to assess the constitutionality of a rule, and that it represents a sounder division of labor for the courts to defer to the constitutional judgments of other branches in these cases.⁶⁰ On such an explanation, the legislature itself has no true moral options left open by the Constitution. (Another, very similar explanation for the appearance of a constitutional optionality, one adopted by Richards⁶¹ and Michelman⁶² to suggest how the Constitution might embody John Rawls'⁶³ philosophy without requiring courts to invalidate all non-Rawlsian governmental rules, is that while the Constitution embodies one moral theory, the courts need only enforce one part of that theory. The other governmental departments must be looked to for enforcement of the theory in its entirety.) We can represent the explanation by Diagram B.

The second thing to note about the nonoptional view of equal protection is the curious role of the democratic legislature. If the Constitution is a complete blueprint of nonoptional governmental rules, then legislatures—the democratic branches—have no true choices to make. At best, some final constitutional authority, or some broad judgmental discretion with respect to certain matters, might be vested in the legislatures rather than the courts; but democracy would then fit into the constitutional scheme as a procedure for certain kinds of constitutional interpretation rather than as a procedure for making true substantive choices about the direction of public policy.⁶⁴

60. See Alexander, *Introduction: Motivation and Constitutionality*, 15 SAN DIEGO L. REV. 925, 930, 934 (1978); O'Fallon, *Adjudication and Contested Concepts: The Case of Equal Protection*, 54 N.Y.U. L. REV. 19, 43 (1979); Perry, *Constitutional "Fairness": Notes on Equal Protection and Due Process*, 63 VA. L. REV. 383, 398-99 n.71 (1977).

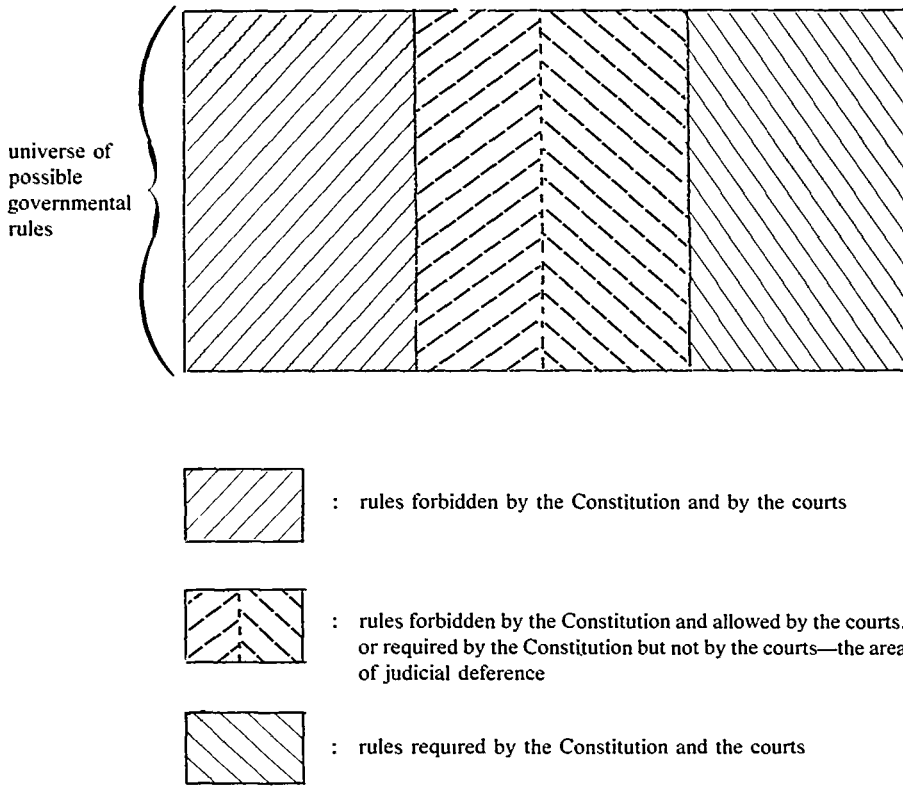
61. D. RICHARDS, *THE MORAL CRITICISM OF LAW* 144-57 (1977).

62. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659, 684-85. See Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973); Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). See also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 918-21 (1978).

63. J. RAWLS, *A THEORY OF JUSTICE* (1971).

64. Moral theory tends to leave no room for politics. See Walzer, *The Moral Standing of States*, 9 PHIL. & PUB. AFF. 209, 228 (1980). Although we recognize the value of allowing individuals areas of unfettered, free choice, we do not recognize the value of allowing governments or governmental officials such areas. Areas that may appear to contradict this, like voting for deputy public defenders as opposed to appointing them (see note 54 *supra*), pardoning a criminal, or appointing a cabinet, are best explained, not as areas of plenary discretion, in which no legal standards govern the decisions, but as areas in which final legal authority does not rest in the courts, or areas in which the courts grant considerable deference to other institutions' judgments. In some cases it is difficult to determine whether an area is one of governmental free choice or is instead an area of private free choice that is given legal effect. See, e.g., *Eubank v. City of Richmond*, 226 U.S. 137 (1912); *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928). See also Alexander, *Cutting the Gordian Knot: State Action and Self-Help Repossession*, 2 HASTINGS CONST. L.Q. 893 (1975).

Diagram B



As we shall see, despite the foreign implications of the nonoptional view of equal protection, there is an inevitable tendency toward it born of the theoretical difficulties inherent in the orthodox opposing view of equal protection as concerned with optional governmental rules.

2. *With Respect to Optional Benefits (and Burdens)*

a. *The Role of Governmental Reasons: Finding the Real Rule that Government Is Following*

Assume that government has a constitutional option whether to provide public swimming pools. Assume further that a rule that allowed only whites to swim in public swimming pools would violate equal protection. (I shall discuss below why the latter rule would violate equal protection, even though public swimming pools need not be provided at all.)⁶⁵ Finally, assume that government is constitutionally permitted to change its mind and revoke an

65. See text accompanying notes 103–13 *infra*.

optional benefit or burden that it previously granted or imposed.⁶⁶ Thus, government could decide at one time to provide public swimming pools and at another to close them.

If we make these three assumptions, then it becomes possible to see why one will be concerned with government's reasons for opening or closing the public swimming pools. If its reason for either rule were to allow whites but not blacks to swim, a reason that it cannot expressly embody in a rule, we might predict a rule of "no public pools" when blacks would be the primary beneficiaries of such pools, and a rule of "public pools" when whites would be the primary beneficiaries. The effects of such changes back and forth between two optional rules would be virtually indistinguishable from the once-and-for-all enactment of the constitutionally forbidden rule, "public pools open only when whites will primarily benefit."⁶⁷

The reason behind the rule—the government's motive—is thus relevant in the area of optional benefits and burdens because, in the absence of a principle requiring government to stick with an option once chosen, government's reason constitutes the meta-rule, the real rule behind the ostensible rule. (In the area of *ad hoc*, optional administrative decisions, such as decisions regarding hiring, when there are no published rules, and when a particular decision is consistent with application of both optional and forbidden rules, the equivalence of the true rule with the government's reason for its decision is quite easily seen. But *ad hoc* administrative decisionmaking is just a special case where the true rule cannot be camouflaged with a published rule that has a different content but produces the same result in the particular circumstances. It is not different in kind from governmental action through published rules.⁶⁸)

This dependence on finding government's reasons for its ostensibly optional rules renders equal protection analysis with respect to optional benefits (and burdens) vulnerable on three grounds. First, there is the huge epistemic problem of discovering just what are government's reasons for its optional rules. Second, there is the conceptual problem of assigning

66. In other words, there is no "freezing principle" at work here that locks government into whichever optional course it first decides upon. If government were locked in, then once it made a choice to allocate or not to allocate an optional benefit or burden, the benefit or burden would no longer be optional. A moment's reflection will tell one that government would have to stick with those allocations that it chose (and that were constitutionally permitted) immediately after the effective date of the constitutional provision in question.

Although the generally accepted position is that government is not usually "frozen" into its original allocation of optional benefits and burdens, there are limited freezing principles in the Constitution that do apply to some governmental shifts in such allocations. Takings of property, impairments of contracts, and severe upsets of vested rights can all be viewed as part of a principle that "freezes" government into certain allocations, at least to the extent of preventing drastic swings between opposite optional positions. In terms that will be developed below, such drastic swings fall into an area condemned by all optional moral theories. See Diagram C and text accompanying notes 103–13 *infra*.

67. See Alexander, *Introduction: Motivation and Constitutionality*, 15 SAN DIEGO L. REV. 925, 928–29 (1978).

68. See Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95. See also Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

“reasons” to multimembered governmental entities such as legislatures.⁶⁹ I will not deal with either of those problems in this Article.⁷⁰ The third problem is that of identifying the step in government’s chain of reasons for its rule that constitutes the reason for which we are looking. Government may close the public pools in order to disadvantage blacks in order (ultimately) to promote the general welfare. Is promotion of the general welfare or disadvantaging blacks the relevant reason for equal protection purposes, and why? More on this below.⁷¹

b. *Evaluation of Government’s True Rule*

After we have identified government’s reason for its rule and thus its true rule, the next step in equal protection methodology with respect to optional benefits and burdens is to ask, is the true rule proper or improper? This question is obviously the central question of equal protection. Moreover, it is central even without judicial review; primary governmental decisionmakers—legislators and administrators—have a duty to act constitutionally, and they must, therefore, assess the propriety of their own rules allocating optional benefits and burdens in particular ways.⁷²

Basically, there are two main types of equal protection theories regarding proper and improper governmental rules for allocating optional benefits and burdens. I shall call the two types substantive theories and process theories. Substantive theories evaluate rules according to principles that dictate how government may affect individuals. Substantive theories thus evaluate governmental rules according to the rules’ effects.⁷³ Process theories on the other hand evaluate rules according to a model of a properly functioning legislative process. Process theorists thus focus on the relation between governmental reasons for the rules and procedural regularity. I shall examine both types of theories and shall attempt to show why process theories ultimately rest on substantive ones or else are unsatisfactory.

69. Related to this problem is the problem of how the conscientious legislator should vote when he knows his colleagues have unconstitutional motives for supporting a rule but he himself has proper motives for supporting it. See Alexander, *Motivation and Constitutionality: A Postscript*, 16 SAN DIEGO L. REV. 885, 886–87 (1979).

70. The first problem is dealt with quite extensively by Larry Simon. Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041, 1065–1130 (1978). See also *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977). The second problem receives some attention in Alexander, *Introduction: Motivation and Constitutionality*, 15 SAN DIEGO L. REV. 925, 937–38 (1978); Alexander, *Motivation and Constitutionality: A Postscript*, 16 SAN DIEGO L. REV. 885, 885–86 (1979); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 212–213 (1980); Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041, 1097–1107 (1978).

71. See text accompanying notes 99–102 *infra*.

72. See Brest, *The Conscientious Legislator’s Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975). Too much attention in the constitutional law literature has been focused on principles of judicial review of other governmental bodies rather than on substantive constitutional principles themselves. See Alexander, *Book Review*, 29 STAN. L. REV. 1299, 1305–07 (1977); Richards, *Human Rights and the Moral Foundations of the Substantive Criminal Law*, 13 GA. L. REV. 1395, 1446 (1979).

73. In looking at a rule’s effects, we are really looking at the effects of the entire set of rules. See Alexander, *Introduction: Motivation and Constitutionality*, 15 SAN DIEGO L. REV. 925, 927 n.14 (1978).

(1) *Substantive Theories for Evaluating Governmental Rules*(a) *Ultimate Moral Principles*

Suppose that equal protection embodies an ultimate moral principle or set of principles that require government to maximize the position of the least advantaged,⁷⁴ to maximize total utility,⁷⁵ or to protect natural rights and provide fair shares of resources.⁷⁶ The only proper governmental rules therefore would be the rules required by the mandated moral principles.

Of course, for equal protection to embody a command that government act to comply with a comprehensive moral position, such as Rawls' or Nozick's, and yet still leave room for governmental options, *equal protection must embody alternative moral positions*—for example, both Rawls' and Nozick's.⁷⁷ If the only proper rule for allocating an optional benefit or burden in a particular way is, say, the (Rawlsian) rule that maximizes the position of the least advantaged, then there would be nothing optional about the allocation. The decisions to award welfare to all the poor, to some of the poor, or to none of the poor would all be assessed according to which rule in fact complies with Rawls' dictates. One of the rules would be constitutionally required.⁷⁸ Put differently, just as the nonoptional view of equal protection must explain why judicial doctrines create the appearance of governmental options and must explain why democracy is important in the absence of substantive choice, *the optional view of equal protection must explain why the moral standards employed to assess the propriety of unequal allocations of optional benefits do not also function as standards to assess the propriety of treating the benefits as optional in the first place.*

Thus, equal protection must contain alternative permissible moral positions as the standards for proper and improper rules if it contains any ultimate moral position at all and yet also treats certain benefits and burdens as optional. Optionality is produced when, for example, either Rawls or Nozick (or

74. See J. RAWLS, A THEORY OF JUSTICE 75, 302 (1971).

75. See J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789).

76. See C. FRIED, RIGHT AND WRONG (1978); R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

77. For an embarrassingly simplistic attempt to equate the governing principles of the Warren Court with Rawls', and the governing principles of the Burger Court with Nozick's, an attempt based on an extremely strained reading of the work of both the Court and the philosophers, see Nowak, *Foreword: Evaluating the Work of the New Libertarian Supreme Court*, 7 HASTINGS CONST. L.Q. 263 (1980).

Actually, when one analyzes properly the implications of Nozick's "Lockean proviso" (R. NOZICK, ANARCHY, STATE AND UTOPIA 174-82 (1974)) for the distribution of shares in material resources and rights to engage in potentially conflicting activities, the difference between Rawlsian and Nozickian distributions is not nearly so great as most imagine. I discuss this fully in my forthcoming book, MODERN LIBERTARIAN THEORY: AN ANALYSIS AND CRITICISM. On the other hand, Rawlsian and Nozickian distributions will not be virtually identical, despite a minority opinion to that effect. See Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980).

78. One might respond that a moral theory could itself carve out spaces for choices not themselves governed by the principles of the theory. Such a moral theory is indeed plausible if we are dealing with choices of individuals. Thus, even a utilitarian might take the rule-utilitarian tack of saying that utility would be maximized if individuals had areas of freedom not subject to the duty to maximize utility. But governments do not possess the attributes of natural persons that make carving out an area of freedom within a moral theory for natural persons plausible for government itself.

Bentham) can render a governmental rule proper. Only if equal protection embodies more than one, but not an infinite number of, moral standards will Justice Holmes' position in his *Lochner* dissent⁷⁹—that the Constitution has room for more than one ultimate moral position—be vindicated without at the same time depriving us of any standard whatsoever for assessing governmental rules. Yet, as I shall demonstrate below, optionality purchased at the price of allowing government to choose between or among ultimate moral positions leads to some rather formidable theoretical difficulties.⁸⁰

(b) *Specific Impermissible Effects*

Equal protection could be thought of as embodying a command not to produce certain specific effects, which effects are described at a level less abstract than the effects described in an ultimate moral theory. Thus, instead of commanding that government act to maximize utility or the position of the least advantaged, equal protection might command only that government not act to worsen the position of, say, blacks as a group.⁸¹

Such a limited substantive standard for evaluating governmental rules is, by hypothesis, not an ultimate moral standard. Therefore, unless the limited standard is a formal rule in that set of formal rules that best implements an ultimate, nonformal moral principle, the limited standard will not be an optimal standard. Equal protection as the embodiment of a limited substantive standard proscribing specific effects is therefore difficult to defend, except as an optimal intermediate rule.

Moreover, even if equal protection were one formal rule in that set of formal rules that best implements an ultimate moral standard, it is difficult to understand why the whole set of such formal rules is not then contained in the Constitution. In other words, why would the Framers grant the government the legal option to engage in some but not all immoral behavior? (Even if equal protection embodied an ultimate moral principle, but a principle that was limited in that it was only one of a set of such ultimate principles within a given moral theory, the same question could be asked.) On the other hand, if the whole set of formal and nonformal standards required by a moral theory are contained in the Constitution, although only one or some are contained in the equal protection clause, we are back to the nonoptional view of constitutionality in general and equal protection in particular. Finally, unless it is possible for more than one set of governmental rules to be consistent with the limited substantive standard that equal protection is supposed to embody, the standard will destroy optionality without even the virtue of being an ultimate moral standard.

Fiss' theory of equal protection employs a limited substantive standard for assessing governmental reasons that falls prey to these difficulties.⁸² Fiss

79. *Lochner v. New York*, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting).

80. See text accompanying notes 99-113 *infra*.

81. See, e.g., Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

82. *Id.*

describes a violation of equal protection as any governmental action that exacerbates the position of groups such as blacks. With a proper theory of state action,⁸³ Fiss' standard leads to an equal protection mandate of *group* equality. Yet that standard lacks any warrant in terms of an acceptable ultimate moral position⁸⁴ or in terms of being a formal rule that best implements an acceptable moral position. And the standard surely leaves little or no room for true governmental choice, since almost every governmental act affects the relative social positions of blacks and whites. Moreover, Fiss' standard has been consistently rejected by the Supreme Court.⁸⁵

Berger's position on the meaning of equal protection—that equal protection is basically synonymous with the 1866 Civil Rights Act⁸⁶—is another example of a limited substantive standard. Equal protection would amount to a very specific moral rule, which might or might not have a rule-consequentialist justification in terms of a more general moral position. Clearly, Berger's position, unlike Fiss', does leave room for governmental options. Any rule that does not allocate a benefit or burden on the basis of race will fall outside the scope of Berger's version of equal protection. Indeed, rules that allocate benefits and burdens on a "separate-but-equal" basis may do so as well. On the other hand, Berger's position, like Fiss', may not represent an optimal formal rule. If the rule outlawed all affirmative action, for example, its costs in terms of an ultimate moral position to which it is ultimately related might exceed the benefits that flow from its rigid, mechanical application.⁸⁷ If the rule made exceptions for instances like affirmative action, it would probably cease to retain its formal quality, the quality that would make it superior to an ultimate moral principle. Finally, the Supreme Court has in a vast number of cases rejected Berger's version of equal protection.⁸⁸

(c) *The Role of the Decisionmaker's Factual Mistakes in
(Optional) Equal Protection Methodology*

In the previous section the focus was on the substantive position—ultimate moral principles or specific impermissible effects—in terms of which

83. See Alexander, *Cutting the Gordian Knot: State Action and Self-Help Repossession*, 2 HASTINGS CONST. L.Q. 893 (1975).

84. The predominant moral concepts in our culture are at bottom individualistic rather than group-centered. See Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 48-52 (1976). See also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 993 n.18 (1978).

85. See, e.g., *City of Mobile v. Bolden*, 445 U.S. 55 (1980); *Washington v. Davis*, 426 U.S. 229 (1976).

86. R. BERGER, *GOVERNMENT BY JUDICIARY* 191-92 (1977). Berger's position on equal protection has been widely attacked. See, e.g., Bennett, "Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory, 67 CAL. L. REV. 1049, 1090-91, 1094 (1979); Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U.L. REV. 651 (1979). It has also been widely supported. See, e.g., Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1026-28 (1979).

87. See, e.g., *Fullilove v. Klutznick*, 100 S. Ct. 2758 (1980); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); Dworkin, *How to Read the Civil Rights Act*, N.Y. REV. OF BOOKS, Dec. 20, 1979, at 37.

88. See R. BERGER, *GOVERNMENT BY JUDICIARY* (1977); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 991-1136 (1978); Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1026-32, 1050-51 (1979).

government's true rules were to be evaluated. As I tried to stress, for government to retain constitutional options in its allocations of benefits and burdens, it must be permitted to choose among more than one set of ultimate moral principles. If government must as a constitutional matter follow Rawls and not Nozick, or *vice versa*, then it will not have any true options. If government is constitutionally permitted to follow either Rawls or Nozick, however, then not only shall we be concerned, as the discussion of meta-rules makes clear,⁸⁹ with whether governmental officials are in a subjective sense attempting to follow a permissible moral theory; we shall also be concerned with whether they are objectively succeeding in following that theory. We shall be concerned, that is, with governmental "mistakes."

At the outset I need to comment on a tradition in equal protection theory that is as strong as it is wrongheaded. That tradition regards a means/ends mistake by the governmental decisionmaker as the *sine qua non* of unconstitutionality under the equal protection clause. According to this tradition, it is not the legitimacy of government's ends as determined under an ultimate moral position that renders government's rules constitutional or unconstitutional. Nor is it the effects of government's rules. Rather, it is the mismatch of those effects with those ends.

This tradition of equating equal protection with instrumental rationality—what I call the mistake theory of equal protection—is directly traceable to the seminal article by Tussman and tenBroek,⁹⁰ although it is probably born of the general post-*Lochner* desire to develop a value-free constitutional jurisprudence.⁹¹ Despite devastating attacks,⁹² the mistake theory continues to thrive, bolstered by Gerald Gunther's Harvard Foreword⁹³ and by thousands of pages of judicial opinions and law review articles that seem totally concerned with means/ends fit.

The idea that government is free under the equal protection clause to pursue any end whatsoever—even oppression of blacks—so long as its means are well-fitted to that end, is incredible on its face.⁹⁴ But governmental mis-

89. See text accompanying notes 65–68 *supra*.

90. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

91. See Alexander, *Book Review*, 29 STAN. L. REV. 1299, 1305–07 (1977).

92. See Baker, *Neutrality, Process, and Rationality as Flawed Bases for Interpreting Equal Protection*, 58 TEX. L. REV. 1029 (1980); Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); Shaman, *The Rule of Reasonableness in Constitutional Adjudication: Toward the End of Irresponsible Judicial Review and the Establishment of a Viable Theory of the Equal Protection Clause*, 2 HASTINGS CONST. L.Q. 153, 166–71 (1975); Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 5–6 (1973); Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972). See also Alexander, *Book Review*, 29 STAN. L. REV. 1299, 1305–07 (1977); Alexander, *Motivation and Constitutionality: A Postscript*, 16 SAN DIEGO L. REV. 885, 887–89 (1979); Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1058–59 (1978). But see Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1, 56 (1980).

93. Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

94. See Alexander, *Motivation and Constitutionality: A Postscript*, 16 SAN DIEGO L. REV. 885, 887–89 (1979).

takes *do* play an important role in equal protection methodology if equal protection deals with benefits and burdens that are optional, although the role that mistakes play is subordinate to the role of evaluating ultimate governmental ends in terms of whether those ends are permitted or forbidden. I shall attempt to describe the proper role of mistakes in (optional) equal protection methodology by focusing on four paradigm situations: (1) when government has an improper meta-rule but has a rule whose effects are inconsistent with the improper meta-rule and consistent with another, proper meta-rule (bad meta-rule, good rule); (2) when government has a proper meta-rule but has a rule whose effects are inconsistent with the meta-rule and consistent only with an improper meta-rule (good meta-rule, bad rule); (3) when government has a proper meta-rule but has a rule whose effects are inconsistent with the meta-rule and consistent with another proper meta-rule (good₁ meta-rule, good₂ rule); and (4) when government has a good meta-rule and has a rule consistent with that meta-rule but has misperceived the relation between the rule and the meta-rule (good meta-rule, good rule, mistaken connection).

(i) *Bad Meta-Rule, Good Rule*

Let us from here on represent "government" by the top official in a city who has general legislative authority. Let us call him Gordon.⁹⁵ And let us represent the affected citizens through two people, Betty and Wilbur.

Suppose that Gordon is permitted by equal protection to follow Rawls or to follow Nozick but is not permitted to follow Bentham. Suppose that Rawls would require the building of a public swimming pool—the pool would maximize the position of Betty, the least advantaged; Nozick would forbid the building of public pools—the taxes on Wilbur would represent forced labor; and Bentham would, like Rawls, require the building of public pools—the utility gains to Betty and Wilbur in terms of swimming and in terms of Betty's feminist external preferences outweigh Betty's and Wilbur's utility losses in terms of taxes and in terms of Wilbur's misogynistic external preferences. Suppose that Gordon wants to follow Bentham but mistakenly foregoes building the pool, the Nozick-required decision.⁹⁶ Should his "mistake" save his decision from invalidation? The situation is illustrated by Diagram C.

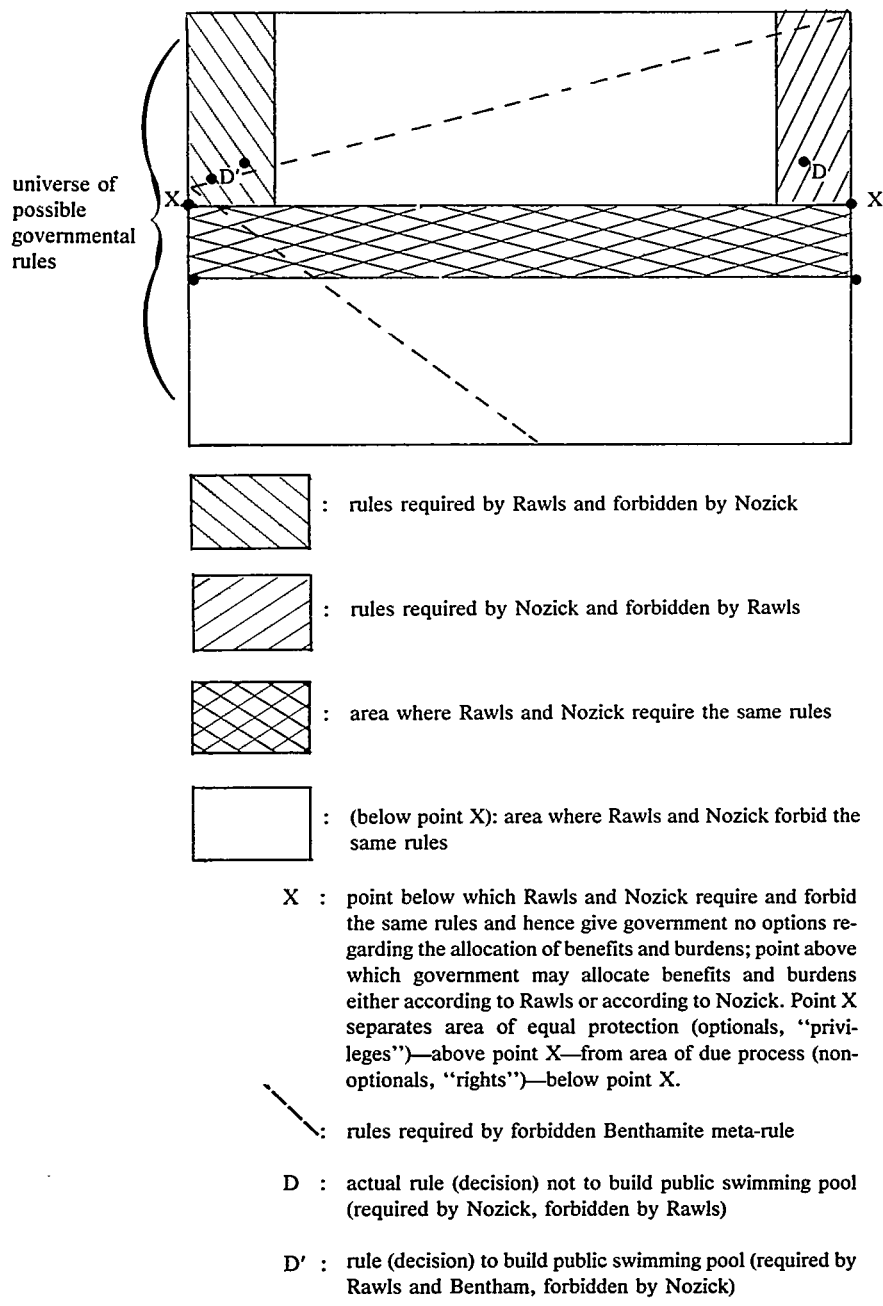
I have already said that following correctly an improper meta-rule (say, Bentham) produces a string of invalid decisions including the decision at the point (p') where that string intersects with a string of decisions under a proper meta-rule (say, Rawls).⁹⁷ Thus, were Gordon to build a pool, a decision consistent with both Rawls and Bentham, his action should be invalidated. If I

95. I am purposely using a masculine name because some of my examples will involve anti-feminine sexism.

96. "Inactions" are as subject to equal protection review as "actions" given a proper view of state action. See Alexander, *Introduction: Motivation and Constitutionality*, 15 SAN DIEGO L. REV. 925, 936-37 (1978); Alexander, *Cutting the Gordian Knot: State Action and Self-Help Repossession*, 2 HASTINGS CONST. L.Q. 893 (1975).

97. See text accompanying notes 65-68 *supra*.

Diagram C



were to say that following an improper meta-rule *incorrectly* also produces a string of improper decisions—that is, that all decisions produced by a government that is following an improper meta-rule are invalid—I would leave Gordon and the courts in the following very messy stalemate. So long as Gordon wants to follow Bentham, he cannot build the pool. But neither can he

forego building the pool, because foregoing building the pool and wanting to follow Bentham are no different from attempting to follow Bentham and in so doing mistakenly deciding not to build the pool. Gordon ought to change philosophers, of course. But until he does so, he can neither build nor forego building the pool, which is absurd. I conclude that Gordon must be allowed to forego building the pool, the anti-Bentham course, even if he thinks incorrectly that he is following Bentham thereby. A mistake saves a rule based on an improper meta-rule, at least so long as the rule adopted is consistent with a proper meta-rule.⁹⁸

(ii) *Good Meta-Rule, Bad Rule*

Suppose Gordon wants to adopt the (permitted) Rawlsian alternative, but mistakenly concludes that Rawls would require a public pool open only to Wilbur. In fact, a public pool open only to Wilbur is the (forbidden) Benthamite decision, though it is not a decision consistent with either of the permitted theories (Nozick or Rawls). Should Gordon's mistake vitiate his decision? The situation is illustrated by Diagram D.

Here the mistake should render the decision unconstitutional. If the court has correctly determined that Gordon is following a permissible meta-rule, invalidating the decision only does what Gordon, when informed of his mistake, would do anyway. If the court, however, has been mistaken, and Gordon is actually following (correctly) an impermissible meta-rule, invalidating the decision accomplishes something—return to a *status quo ante* that (presumably) is consistent with a permissible meta-rule—that would not be accomplished by Gordon himself.

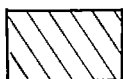
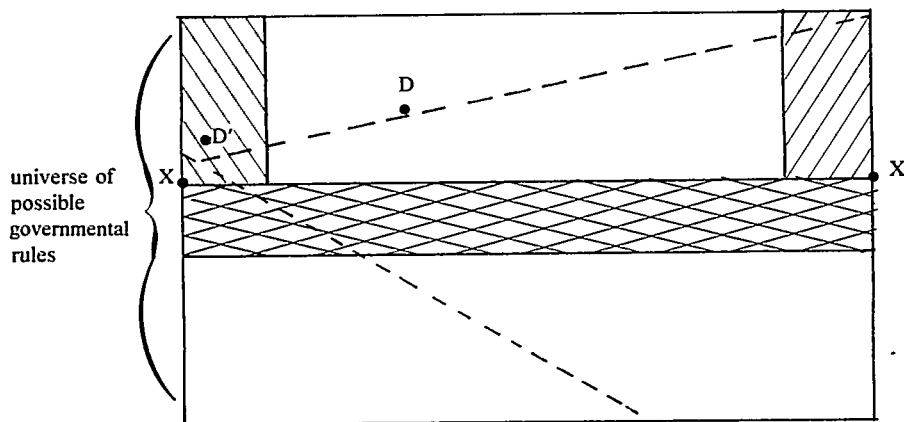
(iii) *Good₁ Meta-Rule, Good₂ Rule*

Suppose that Gordon wishes to follow Rawls (permitted), but mistakenly follows Nozick (permitted) instead and does not build the pool. Has he acted unconstitutionally? The situation is illustrated by Diagram E.

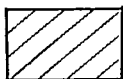
Although it is not clear whether Gordon's mistake renders his decision inherently unconstitutional, it is clear that a court, assuming it could establish Gordon's mistake, should not invalidate the decision. If Gordon has really made a mistake, he will change his decision and build the pool. If he does not build the pool, one can legitimately infer that he is following Nozick, not Rawls. Of course, that inference might be wrong. Gordon may just not agree with the court that he is not doing what Rawls requires. But unless he is doing

98. When correctly following Bentham, the improper meta-rule, leads to a different decision from either correctly following Rawls or Nozick, the proper meta-rules, and the decisionmaker makes a decision consistent with either Rawls or Nozick while attempting to follow Bentham, one could either allow the decision to stand, or one could require a return to the presumably legitimate *status quo ante*, which may or may not accord with the same meta-rule as the decision, since neither the decision nor presumably the *status quo ante* accords with Bentham.

Diagram D



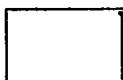
: see Diagram C



: see Diagram C



: see Diagram C



: see Diagram C

(below
point X)

X : see Diagram C

: see Diagram C

D : Gordon's rule (decision), consistent with forbidden Benthamite meta-rule, inconsistent with either permissible meta-rule (Rawls or Nozick)

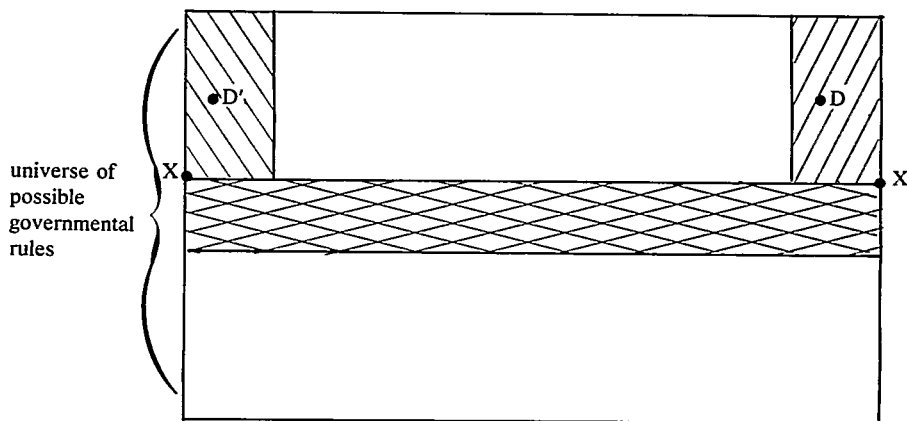
D' : rule (decision) that Gordon's meta-rule (Rawls) would require

something that *both* Rawls and Nozick forbid, it is hard to see why the court should intervene.

(iv) *Good Meta-Rule, Good Rule, Mistaken Connection*

Suppose Gordon wishes to follow Rawls, and he decides to build the pool, the decision in fact required by Rawls. But his intermediate inferences regarding the relation between building the pool and complying with Rawls

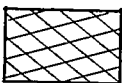
Diagram E



: see Diagram C



: see Diagram C



: see Diagram C



: see Diagram C

(below
point X)

X : see Diagram C

D : Gordon's rule (decision), consistent with Nozick (permitted)

D' : rule (decision) that Gordon's meta-rule (Rawls) would require

are mistaken. Perhaps he believes that the pool will maximize the position of the least advantaged because the swimming skills acquired by the poor will help them in some way to overcome poverty, while in fact the pool will maximize their position by affording them much needed relaxation. The question is whether Gordon's mistake about the effect of building a pool vitiates his correct-from-a-Rawlsian-perspective decision to build it.

I believe the answer should be "no." At present, Gordon is on the actual track laid down by the permissible meta-rule that he is following. If his mistaken factual beliefs are not corrected and lead him off the track in future

decisions, those decisions can be invalidated.⁹⁹ If courts had to concern themselves not only with Gordon's meta-rule, Gordon's rule, and the relation between the two, but also with all of Gordon's intermediate inferences, the costs in terms of judicial burden would be enormous.

Yet, intermediate factual mistakes do give one pause, aside from their evidentiary value in proving the ultimate meta-rule and the consistency of the rule with the ultimate meta-rule. What I have in mind is this example. Suppose Gordon wishes, permissibly, to follow Rawls, and decides correctly to build the pool. But Gordon believes mistakenly that not allowing Betty in the pool complies with Rawls because women are inferior swimmers and would pose a hazard to others. Gordon therefore posts a rule proclaiming that Betty is not allowed to swim. In fact, this latter decision *does* comply with Rawls, not because, as Gordon believes, *women* are inferior swimmers, but because *Betty* is an inferior swimmer.

I have suggested that Gordon's decision should stand. His ultimate meta-rule—Rawls—is valid. His posted rule—Betty may not swim—is what Rawls would require.¹⁰⁰ However, his intermediate meta-rule—women may not swim—does not comply with Rawls, and that is the source of the concern. Nonetheless, it remains indeterminate whether Gordon will act in accordance with Rawls or in accordance with his invalid intermediate meta-rule in future cases; and until it becomes determinate, his decision should stand.¹⁰¹

The implications of this position are unsettling, of course, because when a decisionmaker pursues a permissible ultimate meta-rule through rules based on erroneous factual premises—for example, that blacks are less intelligent than whites—the court cannot automatically invalidate the rules but must instead ascertain whether they comply with the ultimate meta-rule for reasons other than those held by the decisionmaker.¹⁰² But the opposite position, that intermediate factual errors render otherwise valid decisions invalid, would be more unsettling.

(d) *Are Laws that Represent Compromises Between Permissible Meta-Rules Invalid?*

So far we have assumed that if our decisionmaker, Gordon, is not following a permissible meta-rule, his decisions are (with one exception¹⁰³) invalid.

99. See "(ii) Good Meta-Rule, Bad Rule" *supra*.

100. I leave aside the issue of how specific the rules of various governmental bodies may be. See Alexander & Horton, *Ingraham v. Wright: A Primer for Cruel and Unusual Jurisprudence*, 52 S. CAL. L. REV. 1305, 1355-65 (1979); Alexander, *Cutting the Gordian Knot: State Action and Self-Help Repossession*, 2 HASTINGS CONST. L.Q. 893, 915-19 (1975).

101. In Alexander, *Introduction: Motivation and Constitutionality*, 15 SAN DIEGO L. REV. 925, 933 (1978), I stated that an impermissible meta-rule should be grounds for invalidation regardless of whether it was an ultimate meta-rule or an intermediate one, so long as it was a sufficient motive for the rule in question. In this Article, I am assuming that the intermediate meta-rule—the mistaken connection between the permissible ultimate meta-rule and the rule that effectuates the ultimate meta-rule—is not a sufficient motive for any rule *once the governmental decisionmaker realizes the mistake*.

102. Usually they will not square; for that reason, intermediate mistakes are grounds for a strong presumption of unconstitutional effects. See text accompanying note 196 *infra*.

103. See text accompanying notes 95-98 *supra*.

But suppose that we replace Gordon with a collective decisionmaker whose members are the Rawlsians, David¹⁰⁴ and Frank,¹⁰⁵ and the Nozickians, Bernie¹⁰⁶ and Ralph.¹⁰⁷ David and Frank, after consulting Rawls, vote in favor of operating as a public pool a swimming pool that was bequeathed to the town, a decision that will cost public funds. Moreover, they believe that a fairly large expenditure for lifeguards and deck chairs is mandated by Rawls. Bernie and Ralph, however, after consulting Nozick, vote to sell the pool rather than operate it at taxpayer expense. To break the stalemate, which has resulted in an unused, unsold swimming pool, a result no one likes, the legislators agree to a compromise: operate the pool as a public pool, but with a much more modest budget than Rawls would require. The questions are: are *some* such compromises between Rawls and Nozick (our examples of permissible meta-rules) permissible, and if so, are *all* such compromises permissible?

If we answer that no such compromises are permissible, that government must be purely Rawlsian or purely Nozickian, for example, then our position is almost as revolutionary as the pure nonoptional position, the position that required pursuit of one and only one set of ultimate moral principles. All we have done if we require either pure Rawls or pure Nozick is to give the government one basic choice instead of none. Therefore, it appears that to retain optionality, either some positions that are compromises between optional meta-rules should be allowed (illustrated by Diagram F), or else a weak substantive position, one that allows most conceivable meta-rules and rules out only a few, should be adopted.

I shall discuss the latter alternative—a weak substantive position—when I turn to John Ely's view of equal protection.¹⁰⁸ At this point I shall focus on the former alternative represented by Diagram F and ask how permissible compromise positions between our Rawlsian and Nozickian meta-rules are possible. Recall that the area of our rectangle of possible governmental rules that lies above point X—the area of “privileges” (optional benefits and burdens)—is an area in which no individual is worse off than he could be under at least one of the two permitted options: a purely Rawlsian or purely Nozickian world. Below point X, however, unless the governmental rule lies in the cross-hatched area required by both Rawls and Nozick, at least one individual *is* worse off than he would be under *either* Rawls or Nozick.

Governmental rules below point X and outside the cross-hatched area are unconstitutional. What about governmental acts above point X and between the Rawlsian and Nozickian poles? These rules are forbidden by both Rawls and Nozick, and one could say, therefore, that they are also unconstitutional. As I said, that would leave government with only two options—in our

104. D. RICHARDS, *THE MORAL CRITICISM OF LAW* (1977).

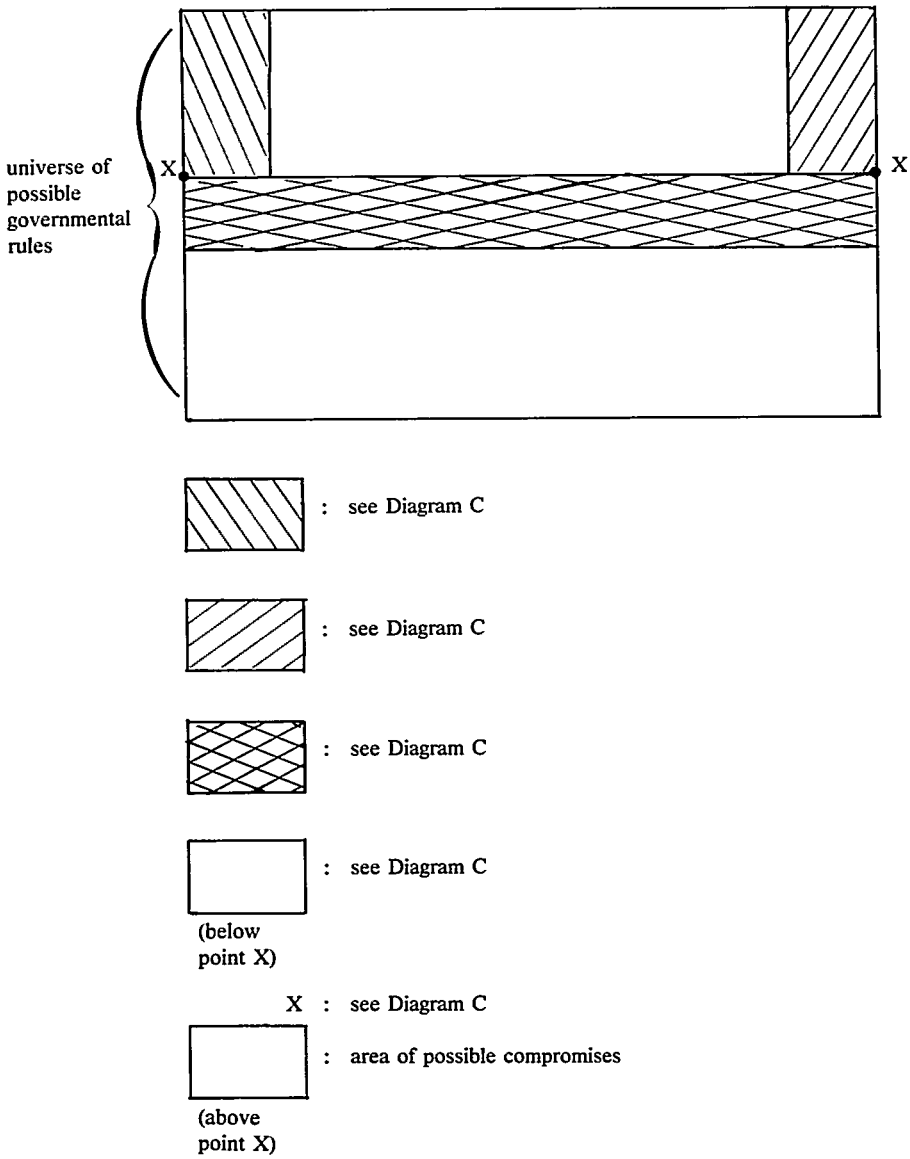
105. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973).

106. B. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980).

107. Winter, *Poverty, Economic Equality and the Equal Protection Clause*, 1972 SUP. CT. REV. 41.

108. See text accompanying notes 131–33 *infra*.

Diagram F



hypothetical, a high-budget public pool (Rawls) or no public pool (Nozick)—a result that is both revolutionary and counter-intuitive.

On the other hand, one could say that because a rule in that area makes no one worse off than he could be under a permissible option (pure Rawls or pure Nozick), *any* rule in that area is constitutional. Thus, all cases of discrimination with respect to optional benefits and burdens—for example, public pools for whites but not for blacks, for old residents but not new

residents, for Democrats but not Republicans, and so forth—are to be tested by whether the challenged rule makes at least someone worse off than he would be under both Rawls and Nozick and thus lies in the blank area *below* point X. All cases of *unconstitutional* discriminations regarding constitutionally optional benefits and burdens would lie in that area.

This analysis can explain our intuitions (and actual case holdings) in a large number of cases. For example, some optional benefits, when awarded unequally, render the person who receives the lesser benefit worse off than had he and the others received no benefit at all, because the benefit is competitive in nature. I may be better off if my school board is appointed than if I have one vote for school board members and you have two. Public education—at least some aspects of it—may be subject to the same analysis. So, too, may be governmental subsidies of certain ideological positions.¹⁰⁹ Other unequal provisions of benefits may be subject to the same analysis because they penalize and thus deter the exercise of a liberty that both Rawls and Nozick would protect against penalty.¹¹⁰ Still other unequal provisions may place one below point X because they dry up alternative private sources of funding for the optional benefits in question.¹¹¹ And still other unequal provisions may create secondary harms that leave someone below point X.¹¹² Thus, a great many cases that we intuit as being instances of unconstitutional discriminations or unconstitutional conditions regarding optional benefits may turn out to be cases only apparently above point X but actually below it.

But there are rules in the blank area *above* point X that also seem unconstitutional. “Greater welfare to whites than to blacks” appears to be an unconstitutional rule even if no one is worse off than he or she would be under one of the pure permissible meta-rules. Can the unconstitutionality of such a rule be explained other than by the fact that the rule is not purely Rawlsian or purely Nozickian—Rawls and Nozick being our assumed permissible meta-rules—an explanation that would wipe out all but one option and leave all blank areas on our diagram as areas of unconstitutionality?

I believe the answer to both questions is “yes.” Some, but not all, rules in the blank area above point X are unconstitutional. The rules in that area that are constitutional are those rules that, in conjunction with all other rules enacted within that area, form a valid compromise meta-rule. A valid compromise meta-rule is, in turn, a meta-rule whose distance from the pure

109. See Alexander, *Introduction: Motivation and Constitutionality*, 15 SAN DIEGO L. REV. 925, 940-41 n.54 (1978); authorities cited in note 57 *supra*; L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 809-11 (1978).

110. Revoking all welfare payments if one chooses an abortion or voices support for socialism may be good examples.

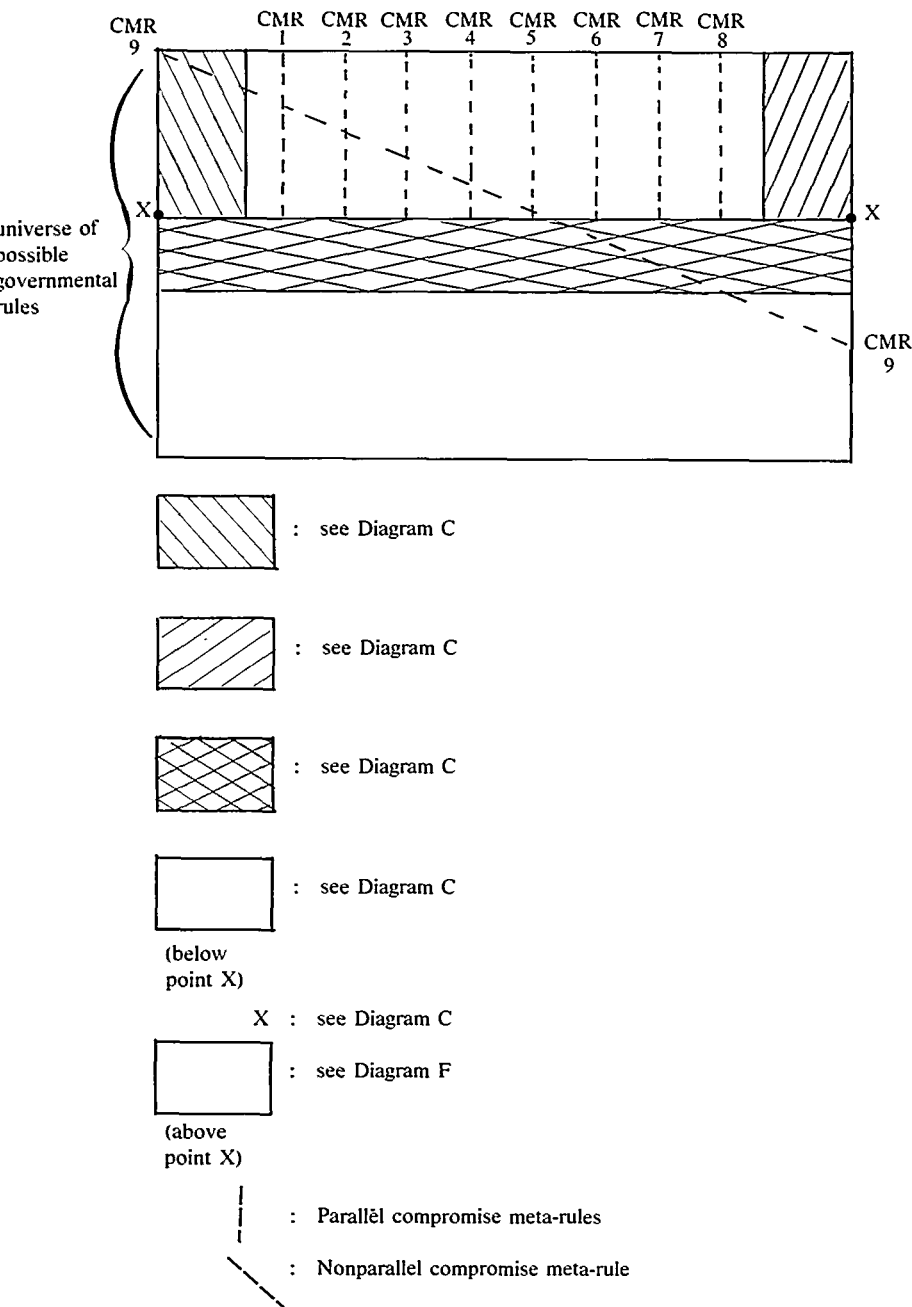
111. Thus, if under Nozick the poor would get no welfare but would receive charity proportionate to need from many of the wealthy, a regime of high welfare for whites but low welfare for blacks, which regime taxed wealthy blacks as well as wealthy whites, might leave the black poor worse off than they would be under Nozick without any welfare whatsoever. See Alexander, *Introduction: Motivation and Constitutionality*, 15 SAN DIEGO L. REV. 925, 940-41 n.54 (1978).

112. For instance, more welfare to whites than to blacks may cause psychic harm to blacks, or stimulate private discrimination against blacks, to the extent that the black poor are worse off in absolute terms than had no welfare been given anyone. See Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 8-12 (1976).

Rawlsian meta-rule is entirely explained by Nozickian motives (and corresponding effects), and whose distance from the pure Nozickian meta-rule is entirely explained by Rawlsian motives (and corresponding effects).

Diagram G displays the difference between constitutional and unconstitutional compromise meta-rules.

Diagram G



The valid compromise meta-rules, CMR₁-CMR₈, all run parallel to the Rawlsian and Nozickian permissible meta-rules. The parallelism represents the fact that Rawlsian reasons explain the compromise meta-rules' lying to the left of Nozick, and Nozickian reasons explain their lying to the right of Rawls. The one pictured invalid compromise meta-rule, CMR₉, runs across the diagram at an angle. That fact suggests that the entire set of rules that comprise CMR₉ cannot be explained *solely* as a compromise between Rawls and Nozick. Thus, had our legislators—David, Frank, Bernie, and Ralph—settled on a relatively luxurious public pool for Wilbur and a less luxurious public pool for Betty, something other than the tension between Rawls and Nozick would appear to be necessary to explain the discrimination. Similarly, if they had settled on a very small redistribution of wealth in the form of essential health care, but as much redistribution of wealth as Rawls would allow in the form of cosmetic surgery, the discrimination again would appear to be inexplicable solely as a compromise between Rawls and Nozick. Both discriminations appear to be part of nonparallel meta-rules that are defined by factors in addition to Rawls-versus-Nozick, such as sexism (in the first example).

Of course, the appearance that a set of rules in the blank area above point X falls within a nonparallel, and hence invalid, meta-rule may be rebutted. Perhaps the luxurious pool for Wilbur but not Betty can be explained by factors such as efficiency that would show that the discrimination in fact lies within a parallel meta-rule. Those factors would, of course, have to be the actual motivating factors and would have to be justified by the actual effects. But equal distribution of optional benefits is not always, and perhaps not often, required in order to fall within a meta-rule that is parallel between, say, Rawls and Nozick.

This concept of parallel compromise meta-rules thus explains how some, but not all, acts within the blank area above point X can be unconstitutional,¹¹³ and why not all true instances of unconstitutional conditions on, or unconstitutional discriminations regarding, privileges are instances in the blank area below point X, where someone is worse off than the permissible meta-rules (here, Rawls and Nozick) would permit.

At this point then I have covered the various substantive theories of equal protection. In all of them, equal protection violations are instances of comparative harm that are not objectively necessary to serve legitimate governmental purposes. Legitimate governmental purposes in turn are defined by the one moral theory embodied in the Constitution (on the nonoptional view), by the two or more permitted moral theories or compromise positions among

113. In other articles, instead of talking about parallel meta-rules, I talked about a plane between egalitarianism and libertarianism, movements off of which plane defined unconstitutional arbitrariness. See Alexander & Horton, *Ingraham v. Wright: A Primer for Cruel and Unusual Jurisprudence*, 52 S. CAL. L. REV. 1305, 1368-69 n.235 (1979); Alexander, *Cutting the Gordian Knot: State Action and Self-Help Repossession*, 2 HASTINGS CONST. L.Q. 893, 900-01 n.27 (1975). In the former article I also pointed out the relation between substantive arbitrariness and procedural arbitrariness. For a slightly different perspective on whether there can be permissible compromises between permissible purposes, see Baker, *Neutrality, Process, and Rationality as Flawed Bases for Interpreting Equal Protection*, 58 TEX. L. REV. 1029, 1086-89 (1980).

them (on the optional view), or as any purposes that do not entail production of specific impermissible effects (on the view that equal protection merely forbids producing such effects).

(2) *Process Theories for Evaluating Governmental Rules*

(a) *Process Theories in General*

We turn now to theories that evaluate governmental rules allocating optional benefits and burdens by the process of deliberation from which the rules emerge, and not directly by the effects of the rules themselves.

Suppose that Gordon has decided to build a public pool but restrict its use to Wilbur. And suppose that Gordon's decision to do so is based on his personal dislike for Betty and his desire to spite her. Our process theorist might tell us that we need go no further in determining the constitutionality of Gordon's decision. We need not assess the effects of the regime of a public pool for Wilbur and none for Betty. The fact that Gordon is motivated to establish such a regime by his dislike for Betty in itself renders his decision invalid.

What explains our process theorist's preoccupation with Gordon's motives and his unconcern with the effects of Gordon's rule? If the theorist is interested in determining the real rule that Gordon is implementing—what I have called Gordon's "meta-rule"—then the process theorist is really no different from the substantive theorist, who also is interested in Gordon's meta-rule; the process theorist still must employ a substantive theory to assess Gordon's meta-rule.

Another unpromising explanation for the process theorist's concern with Gordon's motives is that certain motives, such as Gordon's hostility toward Betty, cause the objects of those motives to feel stigmatized and to resent the decision. I say this explanation is unpromising, not because the concern with process is really a concern with the social effects of the process, but because the explanation is much too strong to be acceptable. Suppose, for example, that Betty is a notoriously poor swimmer, a serious danger to herself and others when in a swimming pool. Gordon knows this and decides for this reason to exclude Betty from the public pool. Betty resents and feels stigmatized by Gordon's rule because she resents and feels stigmatized by Gordon's (correct) assessment of her swimming ability and the hazards her swimming would create. Surely her feelings of stigma and resentment should not be the basis for holding Gordon's rule unconstitutional, just as the resentful feelings of a guilty and properly tried criminal that he was stigmatized by his conviction should not be a ground for holding the conviction unconstitutional. There is stigma, and there is stigma; there is resentment, and there is resentment. Some stigma is deserved; some resentment is unjustified. We can only be concerned with stigma and resentment when the stigma is both real and undeserved, and resentment is appropriate.

The process theorist who focuses on the decisionmaker's motives because of the relation between certain motives and feelings of stigma and resentment must have at hand some moral theory for deciding when stigma is deserved and when those affected by rules can justifiably feel undeservedly stigmatized and/or resentful.¹¹⁴ In other words, a substantive moral theory is

114. The absence of such a moral theory is the defect in Donald Regan's recent article, Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979). Regan argues that *Roe v. Wade*, in which the Supreme Court held unconstitutional bans on previability abortions, was correctly decided, but that it should have been decided on equal protection, not due process, grounds. In essence, Regan maintains that the Court should have avoided the philosophical swampland of determining, as it did, the moral and constitutional protectibility of the fetus in an unconditional manner. The Court's course required it to engage in moral philosophy and to answer one of moral philosophy's most difficult questions, the question of what beings are morally considerable, and why. (The phrase "morally considerable" comes from Kenneth Goodpaster, Goodpaster, *On Being Morally Considerable*, 75 J. PHIL. 308 (1978).) This the Court was ill-equipped to do. Instead, says Regan, the Court should have assumed that fetuses are morally considerable, but that any duty owed the fetus not to abort it is a positive duty of aid, a duty of Good Samaritanism. (The philosophical literature on abortion, infanticide, euthanasia, and the killing of animals is burgeoning. One good collection, among many, of essays on these subjects is MATTERS OF LIFE AND DEATH (T. Regan ed. 1980). The progenitor of Regan's argument, which Regan acknowledges, Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1576 n.4 (1979), is Judith Jarvis Thomson's article, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971).)

Treating the duty not to abort as a duty of Good Samaritanism would appear to toss the Court from the philosophical frying pan of the fetus' moral status to the philosophical fire of the enforceability of positive duties. Indeed, it is plausible to believe that the enforceability of positive duties is the central issue within the liberal tradition, the issue that divides libertarian-liberals from welfare-statist liberals. The Court is probably as ill-equipped to grapple with such an issue as it is to answer the question of the fetus' moral status, and the implications of its resolving the issue *against* enforceable duties to aid would be enormous. Not only would intra-familial duties, as well as the other Good Samaritan duties, especially duties to serve as a witness or a draftee, be suspect, but so too would be much taxation. Although it is uncertain exactly how much taxation is a redistributive imposition of a positive, albeit conditional, duty to labor on behalf of the less fortunate, no doubt much of it is. (I believe that Robert Nozick's argument that redistributive taxation is tantamount to forced labor is correct. See R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 169-72 (1975). Basically, if one must labor a certain amount to survive, and if the product of that amount of one's labor is taxed, then the effect of the tax is to coerce, upon pain of non-survival, labor beyond that amount necessary for survival. Charles Fried's consumption tax would also be a tax on productive labor, despite Fried's insistence to the contrary. See C. FRIED, *RIGHT AND WRONG* 147-49 (1978). I discuss Fried's position more fully in a forthcoming book analyzing libertarian theory. L. ALEXANDER, *MODERN LIBERTARIAN THEORY: AN ANALYSIS AND CRITICISM*.) If the Court could have found abortion laws unconstitutional only upon either finding enforcement of positive duties unconstitutional or finding the fetus to be morally unprotectible, the latter course appears less far-reaching if not less difficult.

Regan, however, believes the Court could have avoided both of these moral philosophical issues and still held abortion laws unconstitutional. All that the Court needed to do was to compare the positive duty imposed on pregnant women to carry unwanted fetuses to term with the few other positive duties imposed by law. According to Regan, no other class of persons is held to so onerous a positive duty to aid another individual, even when the latter's life is at stake, as the class of pregnant women. Therefore, he concludes, the Court could and should have decided that anti-abortion laws violate the principle of comparative justice embodied in the equal protection clause without deciding either of the two difficult noncomparative justice issues mentioned, namely, the issues of the moral status of the fetus and the enforceability of positive duties.

I think Regan's argument for this proposition needs a lot of shoring up, although I'm not prepared to assess the argument fully in this Article. Briefly, Regan believes the positive duty imposed by anti-abortion laws is more onerous than the positive duty imposed by military conscription because the latter is not imposed for the benefit of specific individuals. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1606-07 (1979). Why this distinction, if it can be made at all, matters is left unclear. We are apparently to intuit the difference and also intuit it in favor of the pregnant woman. I have to confess that my intuitions tell me less than Regan's here.

Regan dismisses duties of children to support their parents, which duties cannot be avoided by giving up the parents for adoption, *id.* at 1597, as merely monetary. *Id.* at 1609. But monetary burdens for most of us translate into burdens of labor, burdens that might be very onerous indeed for the child whose source of income is hard physical labor and whose impoverished parents need support for a long period of time. So in filial duties of support—and also in duties of fathers to support unwanted children, *id.* at 1598 n.36—we have examples of positive duties to aid specific individuals through the labor coerced by a form of taxation.

Finally, and perhaps most interestingly given Regan's assumption that no parent could ever be compelled to donate an organ to a child, *id.* at 1586, assume that a mother and her nursing infant are on a cruise when a

shipwreck leaves them stranded on an uninhabited island. The mother, a good swimmer, can swim to a nearby island that is a frequent stop for ships. Unfortunately, in the time it will take her to swim to that island and get help, her baby will die. Alternatively, she can remain on the present island and nurse and care for the infant for nine months until the next cruise ship comes by. The latter course of action will be quite taxing physically. Regan must assume that the law would not impose a duty on the mother to remain and care for the child. I would not make such an assumption.

Underlying Regan's argument is an assumption that he makes explicit at the end of his article, that is, that the judgments of comparative justice called for by the equal protection clause are somehow easier for the Court to make than the noncomparative judgments that Regan thinks the Court should have avoided in *Roe*, or at least that the comparative judgments do not involve moral philosophy. See text accompanying notes 211–16 *infra*. Thus, in his penultimate paragraph, Regan writes:

If I had been writing an essay about moral philosophy instead of about constitutional law, I would have made the argument in favor of abortion turn centrally on the proposition that a fetus is not a person. I would *not* have relied on the proposition that there is no general duty to aid a person in serious danger even when one can do so at trivial cost to oneself. I would not have appealed to any notion that corporal punishment is impermissible, nor indeed would I have given the same negative weight to physical invasions generally that I do in the present essay. I would not have claimed that there is a right to kill an innocent rapist. However, I have not been writing about moral philosophy. I have been writing about American constitutional law. For reasons I cannot explain here, I think the projects are quite different.

Id. at 1645–46.

It is Regan's point that his equal protection analysis steers clear of moral philosophy that I, of course, deny. Equal protection analysis, especially extended beyond racial discriminations—indeed, extended beyond the racial discriminations specifically condemned by the fourteenth amendment's Framers—leads unavoidably to moral judgments and hence to moral philosophy. I will illustrate this point by focusing upon Regan's leap from the position that anti-abortion laws impose more onerous burdens of Good Samaritanism than do any other laws to his position that anti-abortion laws violate equal protection.

How does Regan make this leap? How does he get from the "fact," if I can call it a "fact," that women restricted from having abortions are our most onerously burdened Good Samaritans, to the conclusion that equal protection is violated? Mere inequality of burden will not do the trick, for it is clearly incorrect to assume that equal protection requires that everyone in society be equally burdened. What about wrongdoers, for example?

Regan needs some sort of model of equal protection. Moreover, for his purposes it must be a model that makes no reference to such moral-philosophical notions as "desert," "justice," and so forth. It must by all means skirt the relative merits of egalitarianism, libertarianism, and other "isms." Otherwise, we are right back into answering those tough philosophical questions we set out to avoid.

I would be unfair to Regan if I held him deficient in not providing us with a full-blown and noncontroversial theory of equal protection, especially since he acknowledges that he does not have such a theory. *Id.* at 1624. Nonetheless I think it's fair to hold Regan to the claim that, because equal protection analysis is not moral theory, an equal protection model can be produced that avoids the hard philosophical questions mentioned.

On its face the contention that we can *justify* an application of a vague norm like equal protection, especially outside the core cases the Framers had in mind, without recourse to moral theory strikes me as odd, if not incoherent. But the proof of the pudding is in the eating, so how does Regan's pudding taste?

Regan first tells us that the woman who desires an abortion is somewhere in the middle in terms of *eligibility* to be a Good Samaritan. *Id.* at 1622–23. How do we determine such relative eligibility? It is self-evident? I would contend that judgments of relative eligibility are formed against the background of a moral theory and are only as justifiable as that theory.

Even if eligibility for Good Samaritanism is somehow theory-neutral, what of the implied claim that the burdens of Good Samaritanism should be scaled proportionately to such eligibility? If that claim is not analytic—packed into the concept of eligibility itself—it surely requires a moral theory to justify it.

Regan calls his equal protection approach the "reasonable American legislature test." *Id.* at 1627. A law violates equal protection if a reasonable American legislature, fully apprised of the "costs" of the inequality created and the "benefits" obtained therefrom, would enact the law. Such a test, however, obviously relies on a moral theory about what effects government may and may not produce. The word "reasonable" in Regan's test discloses the reliance on a background moral theory; for unless Regan means by reasonable something purely descriptive, such as how the average legislature would in fact act, we cannot assess what a reasonable legislature will do unless we know *what is reasonable to do*.

Regan is up a moral creek without a moral paddle. We are told the costs of inequality vary with the "degree of suspectness" of the classification employed by the law. *Id.* at 1626, 1628, 1632–33. (Regan's discussion on this point is confusing, but I read him as saying that a bad governmental purpose means a hidden suspect classification, not that a suspect classification suggests a bad governmental purpose.) What is apparently involved here is the very interesting notion that suspect classifications are important to equal protection because they impose some special objective harms on members of the suspect class, not, as the more prevalent view would have it, because they raise a suspicion that the legislature was not employing the right conception of

necessarily prior to a process theory built on stigma and resentment.¹¹⁵

When supplemented by a moral theory that identifies the relevant instances of stigma and resentment, the process theorist's explanation for his concern with motives is no longer too strong. Now, however, it appears too weak. If we have in hand a moral theory that allows us to assess governmental rules in terms of their moral justifiability, why should we concern ourselves with only that subset of morally unjustifiable rules that gives rise to feelings of stigma and resentment? Is a constitutional theory plausible that directs us to ignore injustices whenever the victims do not perceive or do not resent those injustices? I think not.

The process theorist must therefore be concerned with the decisionmak-

moral worthiness. See text accompanying notes 182-85 *infra*. The latter view of suspect classifications obviously leads eventually to arguments over moral theory, since each moral theory implies a different conception of absolute and relative moral worthiness. Regan's notion of suspect classifications appears to avoid moral theory and conceptions of moral worthiness by focusing on *objective harms caused by classifications* rather than on *controversial injustices suspected* because of the classifications.

But to the extent Regan's notion avoids moral theory, it becomes quite mysterious. What is so special constitutionally about those harms caused by, say, racial classifications? Why should *resentment* (the harm Regan apparently believes is caused by suspect classifications) over, say, racial inequalities matter more than resentment over classifications that distinguish opticians from optometrists? See *id.* at 1630-31. And should all resentment caused by inequality-imposing classifications be considered in the equal protection balance, or *only that resentment that is morally justified*? These questions, as well as the question of what resentment is justified, are obviously all moral questions. (The status of "external preferences" and other "moralisms" within consequentialist moral theories is hotly debated in moral philosophy. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 234-39, 275-78 (1977); N. RESCHER, *UNSELFISHNESS* 70-97 (1975); Baker, *Counting Preferences in Collective Choice Situations*, 25 U.C.L.A. L. REV. 381 (1978); Dworkin, *Liberalism*, in *PUBLIC AND PRIVATE MORALITY* 113, 133-34 (S. Hampshire ed. 1978).)

Regan also mentions that the harms imposed on some women by anti-abortion laws are of special concern because they cumulate with the harms from past unjust treatment. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1632 (1979). To the extent cumulative harms merely explain resentment, they add nothing new to Regan's general analysis of suspect classifications. To the extent they suggest "unjust" harms apart from resentment, they obviously require a theory of distributive and compensatory justice as a backdrop.

Regan tells us that the "fundamental interests" implicated in anti-abortion law—nonsubordination of one person to another, and freedom from physical invasion—also count in his "reasonable American legislature" equal protection test, even though we may assume that there is nothing unconstitutional *per se*—i.e., in a noncomparative sense—in so burdening persons. *Id.* at 1630-31, 1635. Because Regan does not want to relate these inequalities regarding fundamental interests directly to a theory of justice, a course that too obviously involves moral philosophy, he instead relates them, like suspect classifications, to the "cost" of resentment and goes no further. I hope by now the reader is persuaded that Regan did not go far enough.

Finally, just how does a "reasonable American legislature" weigh and balance the resentment costs (and other costs) of inequality-creating classifications against the benefits sought to be gained through use of those classifications? Which benefits can legitimately be counted? How are they to be weighed against costs? Recourse to moral theory ultimately is required here as well.

115. Of course, some consequentialist moral theories, like utilitarianism, might have to weigh in the moral calculus even unjustifiable (from a utilitarian's perspective) feelings of stigma and resentment. In other words, a consequentialist may have to consider, as part of the relevant consequences, the effects of immoral and incorrect moral beliefs. This is a notorious difficulty with consequentialist theories, one that I shall not and need not pursue here. See the authorities cited in note 114 *supra*. But it does have implications for the decisionmaker under a Constitution that requires or permits him or her to pursue a consequentialist moral position, especially when it comes to the question of how the decisionmaker is to factor in the impermissible moral positions and incorrect factual beliefs of the populace. If a constitutional "right" is based on consequentialist reasoning of this sort, then the scope of the right or its application may very well be affected by, for example, others' attempts to deprive people of the right. Compare *Cooper v. Aaron*, 358 U.S. 1 (1958) (threats of violence in the context of school integration), with *Lee v. Washington*, 390 U.S. 333 (1968) (threats of interracial violence in the context of the decision whether to segregate prisoners). Indeed, a decisionmaker might even be permitted or required constitutionally to take into account the effect of a decision on his or her chances for reelection. See also Alexander, *Introduction: Motivation and Constitutionality*, 15 SAN DIEGO L. REV. 925, 945-46 (1978).

ing process for its own sake, not because of the reactions people might have to it. Indeed, most major process theories do rest primarily on some notion of a fair process and only secondarily on the untoward social effects of unfair processes. But process theorists ultimately identify as examples of *procedural* unfairness either (1) the unfairness that results from basing a decision on an improper moral theory or (2) the unfairness that results from basing a decision on incorrect factual beliefs.¹¹⁶ Thus, take two different instances in which Gordon decides to build a pool for Wilbur and not for Betty. In one instance Gordon does so because he believes that women are morally inferior beings, not entitled to equal concern and respect. In the other instance he does so because he believes that women cannot swim. In the first instance he has made an error in his choice of moral principles. In the second he has made a factual error. Both types of error can lead to the same unjustifiable rule, and both can be lumped under the heading of "prejudice" infecting the decision-making process. Finally, although they are different types of error, either type might be classified as a form of *procedural* unfairness.

It should be obvious, however, based on the discussion in the preceding sections, that process theories that are concerned with prejudice (error) of either sort are really indistinguishable from substantive theories. A substantive theory that permits options will require that the decisionmaker in fact be acting in pursuance of one of the permitted moral theories—that is, that he not be acting in pursuance of improper moral principles and their implied view of moral worthiness. Moreover, a substantive theory will require not only that at the time of the challenge to the rule, the decisionmaker is still acting in pursuance of a permitted theory, but also that the effects of his rule actually accord with that theory—that is, that he has not made a means/ends mistake. Nor would a process theory differ, for it too must require a legitimate *present* view of moral worth and also that the present effects of a decision be consistent with acting on that view. After all, how can a decisionmaker credibly claim to continue to be acting in pursuance of a proper moral theory after it is proved in a lawsuit that his rule produces effects inconsistent with those effects required by the theory?¹¹⁷

Let us go back to Gordon, Betty, and Wilbur. Under a substantive theory, Gordon's decision whether to build the pool and whom to allow to swim is evaluated according to (1) whether the decision is consistent in its effects with one of the permitted ultimate theories (say, Rawls or Nozick) and (2) whether the decision was made in pursuance of that theory (whether that theory *was* the meta-rule). Under a process theory, when we are concerned with whether Gordon acts on the proper view of Betty's and Wilbur's moral worth, what will be the difference? We still need to ask whether Gordon's

116. I hope that the reader will go along with this rough division between improper moral and incorrect factual beliefs and not challenge me on meta-ethical grounds. I am fully aware that the relation between "values" and "facts" may be far more complex than my division suggests.

117. See Alexander, *Introduction: Motivation and Constitutionality*, 15 SAN DIEGO L. REV. 925, 932-33 n.30 (1978).

moral theory, from which he derives his judgments of moral worth, is one of the permitted ones, and we still need to ask if his rule produces effects consistent with that theory. (If it does not, and he is so apprised, how can he claim that he is still acting according to the permitted theory when he does not alter his rule?) I conclude that there are no process theories of equal protection that are tenable and yet not dependent on and reducible to substantive theories.¹¹⁸ The important questions in equal protection theory concern whether the decisionmaker has substantive options and, if so, whether these options are defined in terms of ultimate moral positions or in terms of the avoidance of specific effects, such as harm to a racial group, that are only contingently related to any ultimate moral position.

(b) *John Ely's Attempt at a Pure Process Theory:
Equal Protection and Representation-Reinforcement*

I have denied that a plausible process theory of equal protection—one that does not collapse into a substantive theory—can be constructed.¹¹⁹ Yet John Ely, one of the subjects of this Symposium, claims that his theory of equal protection does not rest on a substantive theory of fundamental moral values but rests solely on the constitutionally referable procedural value of equal participation in the democratic process. I maintain, however, that to the extent that Ely applies equal protection beyond the award of the franchise to decisions allocating other benefits and burdens, he must employ a substantive moral theory.

To begin with, Ely views equal protection, along with the ninth amendment and the fourteenth amendment's privileges and immunities clause, as what I have called a neo-interpretivist provision—that is, an empty-vessel provision that represents a delegation of authority to future decisionmakers to supply the values necessary for fleshing it out.¹²⁰ Ely, eschewing moral philosophy and other extra-constitutional sources for equal protection's flesh, comes up with "broad participation in the processes and distributions of government"¹²¹ as a value implicit in the constitutional scheme viewed as a whole. But, aside from the point, ably expressed by others,¹²² that Ely fails to justify the imposition of his implied-from-the-Constitution conception of democracy against the will of the branches that are constituted according to an expressed-in-the-Constitution conception of democracy, Ely fails to estab-

118. See also Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1175-79 (1977).

119. On the relation of process to substance in other areas, see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 501-63 (1978); Alexander & Horton, *Ingraham v. Wright: A Primer for Cruel and Unusual Jurisprudence*, 52 S. CAL. L. REV. 1305, 1351-88 (1979); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

120. See text accompanying note 18 *supra*.

121. ELY, *supra* note 1, at 87.

122. See M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS*; Lynch, *Book Review*, 80 COLUM. L. REV. 857, 862-63 (1980); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1071 (1980); Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1047-51 (1980).

lish that his use of equal protection to invalidate democratically made decisions can be justified in terms of democratic participation viewed as a procedural, not a substantive, value.

Ely maintains the function of equal protection is to eliminate a particular form of impediment in the democratic process, namely, prejudice against discrete and insular minorities—the “they’s,” who are different from and inferior (so it is believed) to the “we’s” in the legislature. Despite difficulties in principled and consistent elaboration,¹²³ Ely’s “we-they” test for “suspect classifications” could perhaps prove quite valuable to courts in determining when a violation of equal protection—improper meta-rule or improper effects—is probable and thus when close judicial scrutiny of the governmental rule is worth its cost in terms of time, money, risk of error, and intragovernmental good will.¹²⁴ But how can the suspected evil behind a “we-they” distinction—prejudice—be considered a purely procedural defect, unrelated to a substantive moral theory?

Earlier¹²⁵ I distinguished two forms of “prejudice”: (1) improper moral principles—for example, principles that dictate that blacks are of inferior moral worth; and (2) inaccurate factual beliefs—for example, a belief that blacks are less intelligent than whites. The first form of prejudice is clearly dependent on a substantive moral theory. It cannot serve as the basis for a value-free, purely process-oriented jurisprudence of equal protection. Equal protection might allow government to follow a desert-based moral theory and thus treat murderers with less respect than others.¹²⁶ Or it might forbid desert-based moral theories on Rawlsian or Nozickian grounds.¹²⁷ But to the extent that equal protection rules out or rules in *any* ultimate standard of moral worth, it is unquestionably substantive.¹²⁸

Other areas of the Constitution—for instance, the dormant commerce clause and the interstate privileges and immunities clause—that deal with state governmental treatment of the interests of those (citizens of other states) without direct representation in that government, unquestionably demand

123. See Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1073–77 (1980); Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1052–53 (1980). Is a law that principally burdens whites, passed by a legislature comprised of a large minority of racist blacks and a diverse majority of whites, the product of a “we-they” distinction? That type of question suggests that Ely’s test, though useful, cannot be employed mechanically.

124. See text accompanying notes 182–87 *infra*.

125. See text accompanying note 116 *supra*.

126. Tribe uses burglars as his example to make the same point. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1075 (1980).

127. Rawls objects to desert-based theories on the ground that the characteristics on which desert ascriptions are premised are solely the result of the natural lottery. J. RAWLS, *A THEORY OF JUSTICE* 310–15 (1971). As I have elsewhere pointed out, it is conceivable that a Rawlsian, applying maximin to everyone, including criminals, might have to reward criminals rather than punish them, since those being punished must be considered in determining who is the least advantaged. See Alexander, *The Doomsday Machine: Proportionality, Punishment and Prevention*, 63 MONIST 199, 200 (1980). Libertarians like Nozick, who object to desert-based distributions generally, also have difficulty with finding any limiting principles for punishment. See *id.* at 220 n.5.

128. See Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1076 (1980).

that the unrepresented be treated as having equal worth. Unlike resident blacks, who can vote and elect representatives, nonresidents must be accorded some form of "virtual representation" through a requirement of equal regard.¹²⁹ Ely would claim that even groups that *are* represented in the government, such as blacks, must be accorded the same equal regard as the unrepresented, and that this is the distinct contribution of equal protection to the constitutional scheme.¹³⁰ (The equal moral worth of blacks is also the only coherent premise behind extending them the franchise in the fifteenth amendment.)

If this is Ely's view, then Ely is clearly committed to a substantive value—equal regard—that goes beyond representation. Of course, although some moral theories—for example, racist or sexist ones—*are* ruled out by such a view, until *the* proper conception of equal regard—Rawlsian, Nozickian, Benthamite, and so forth—is identified, equal protection is a very weak constraint on government, one pretty much irrelevant to most contemporary governmental decisions disadvantaging minority groups.¹³¹ This view of equal protection as incorporating a weak substantive value may be an acceptable compromise for Ely, who does not want equal protection to rest on moral theory, but who cannot have an equal protection premised solely on democratic representation without rendering it too weak to invalidate any non-mistaken democratic decisions.

The second form of "prejudice"—the factual mistake form—can serve as a useful adjunct to a substantive view of equal protection, and I have attempted to delineate the proper role of mistakes.¹³² But if Ely wishes to treat mistakes as violations of equal protection without regard to ultimate moral principles, then his position is subject to the *reductio ad absurdum* of all pure mistake theories: so long as the government is pursuing evil ends through means that are well-suited to those ends, it does not violate equal protection.

I think, given the untenability of a pure mistake theory and the ineluctably substantive nature of a theory that allows one to distinguish permissible and impermissible views of moral worth, that Ely should be read as holding a weak substantive theory, one that rules out the moral inferiority of blacks as an ultimate moral principle, but rules out very little else—for example, the ultimate moral views that permit criminals to be accorded less moral concern and that permit the capitalist system to exist. Ely's is therefore both a substantive and an optional view of equal protection, with the optional area much broader—inclusive of many more permissible meta-rules—than merely, say, Rawls and Nozick. Ely's position is illustrated by Diagram H.

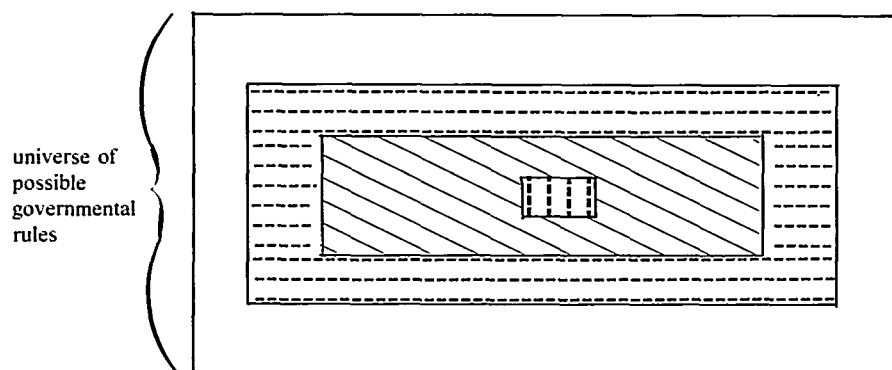
129. ELY, *supra* note 1, at 82–84.





130. *Id.* at 82.

131. It is just as likely in today's world that minority groups will be disadvantaged by colorblind utilitarian values as by overtly racist ones. See Alexander, *Introduction: Motivation and Constitutionality*, 15 SAN DIEGO L. REV. 925, 945 (1978); Baker, *Neutrality, Process, and Rationality as Flawed Bases for Interpreting Equal Protection*, 58 TEX. L. REV. 1029, 1056 (1980); Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1056 (1980).

132. See text accompanying notes 89–101 *supra*.

Diagram H



-  : area of rules forbidden by specific, interpretive constitutional provisions that define the democratic process
-  : area of rules required by specific, interpretive constitutional provisions that define the democratic process
-  : area of permissible, but not required, rules
-  : area of rules forbidden by the equal protection clause because reflect a racist or sexist meta-rule

The problem with all optional views of equal protection—views that permit more than one but not all possible moral theories to serve as meta-rules—is that the weaker they are (the more options they permit), the more foundationless they appear to be. How is it that we can rule out an ultimate moral principle of white (or male) moral superiority without producing arguments that would also rule out some, and perhaps all but one, of the other moral theories presumably permitted—radical egalitarian, communitarian, Rawlsian, Nozickian, Benthamite, Benthamite *sans* external preferences, desert-based, and perfectionist? Each theory has a specific conception of moral worth and its bases. Ruling out racist (or sexist) conceptions of moral worth, but remaining totally agnostic with respect to all other conceptions, is philosophically problematic.¹³³

133. See Alexander, *Introduction: Motivation and Constitutionality*, 15 SAN DIEGO L. REV. 925, 945, 947 (1978).

Of course, one can cite the fifteenth (and nineteenth) amendment as evidence that the constitutional scheme of which equal protection is a part rules out any moral theory that includes a principle of white (and male) superiority. The point is, however, that the constitutional scheme makes more sense if it rules out racism and sexism as part of ruling out a great many moral views and permitting very few, than if it merely rules out those specific views and permits almost all others.¹³⁴

Others have noted that Ely's "process" view makes sense only against a background of a substantive view.¹³⁵ Indeed, some, like Frank Michelman, have argued that Ely's equal participation value really implies a whole panoply of substantive rights. The concept of equal worth that Ely holds does not merely exclude a racist meta-rule; it demands a pro-Rawlsian one.¹³⁶ Although I am certain Ely would reject Michelman's strong substantive interpretation, and although I do not believe that ruling out a particular conception of moral worth such as the racist conception can only be justified from the perspective of a single alternative conception like Rawls', I believe Michelman's interpretation lends credence to my claim that extremely weak substantive theories, as I interpret Ely's to be, are most difficult to justify.

Edwin Baker has interpreted Ely's "process" theory—his nonsubstantive, value-neutral, participation view of equal protection—in still a different

134. As an alternative to reading Ely's position as a weak substantive one, one might read Ely as holding a stronger substantive theory of equal protection—perhaps even a nonoptional one—but one that permits judicial intervention only when the legislature is unlikely to rectify its moral mistake in the foreseeable future because of the political underrepresentation of the victims of governmental immorality, that is, their discreteness and insularity. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4 (1938). Such a view, however, is difficult to justify. Presumably, under this view the courts could as easily recognize immoral treatment of persons who were not underrepresented politically as they could recognize immoral treatment of the protected minorities. If so, the mere fact that the legislature does not face the impediment of underrepresentation in recognizing and correcting its moral errors hardly justifies a court's sitting idly by and knowingly allowing injustices to persist.

135. See Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659, 670 *et seq.*; Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1175–79 (1977); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L. J. 1063 (1980). See also Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 7–15 (1979); Lynch, *Book Review*, 80 COLUM. L. REV. 857, 860–62 (1980).

136. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659, 670 *et. seq.* But see Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695. Edwin Baker and Kenneth Karst also derive quite substantive views of equal protection from their (analogous to Ely's concept of equal participation) concepts of equal respect (Baker) and equal citizenship (Karst). Baker, *Neutrality, Process, and Rationality as Flawed Bases for Interpreting Equal Protection*, 58 TEX. L. REV. 1029, 1030–31, 1043 (1980); Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977).

The problem with views like Michelman's, Baker's, and Karst's views of democratic participation is to identify the substantive issues that are left for the democratic process to resolve once one has awarded all sorts of substantive rights—in the face of majority opposition—on the ground that these rights are necessary for participating in the democratic process. Of course, all nonoptional views of equal protection must explain how politics fits into the constitutional scheme, if at all. Views that purport to be optional ones, with major issues left to democratic resolution, but that require all sorts of substantive rights as preconditions for true democracy, run the great risk of becoming nonoptional views through the backdoor of their peculiar concept of democracy. If in making political decisions, I can only respect the interests of persons who are well-fed, well-housed, well-employed, and well-educated, what interests of theirs are left for me to respect in my decisionmaking once they are well-fed, etc.?

way. Baker argues that Ely's concept of democracy requires the legislature to count everyone's preferences, which is what is meant by representation.¹³⁷ Legislatures are generally good at counting preferences, but they cannot be trusted to count the preferences of certain groups, for example, blacks. The judiciary's role is to intervene in cases in which the likelihood is strong that the legislature has not counted certain preferences (and will not, if not forced, count them in the foreseeable future). The logical consequence of such intervention is for the judiciary to order the legislature to implement those policies that it would have implemented had it counted everyone's preference.

On Baker's version of Ely's theory, the theory is a "process" theory because it is concerned with breakdowns in the legislative process of counting preferences. It is nonsubstantive because the legislature is presumably supposed to count everyone's preferences and not refuse to do so for, say, moral reasons.¹³⁸

I think it is clear, however, that if Baker's version of Ely is correct, then Ely's theory is a substantive theory, not a process one, and it is, moreover, a nonoptional substantive theory. As Baker portrays it, Ely's theory is that of pure preference utilitarianism.¹³⁹ The legislature must count all preferences and weigh them in the utilitarian calculus proportionate to their strength. (It would be nonsensical to require the legislature to count all persons' preferences but to allow it to discount or inflate the weight of those preferences for reasons other than the strength of the preferences.) Like Dworkin's theory of equal protection,¹⁴⁰ the theory that Baker links most closely to Ely's, Ely's theory as portrayed by Baker is decidedly substantive, not procedural.

Moreover, under Ely *à la* Baker, the legislature has no true substantive options. It must implement whatever policies are dictated by preference utilitarianism. Presumably it could be replaced by a computer programmed according to preference utilitarianism so long as there were no disagreements over matters of fact. (The computer would be superior to a legislature with respect to the problem of ignoring the preferences of certain groups.)

Such a strong substantive, nonoptional view of equal protection is difficult to reconcile with Ely's own view of his theory as one in which the Constitution places the processes of democracy above substantive moral

137. See Baker, *Neutrality, Process, and Rationality as Flawed Bases for Interpreting Equal Protection*, 58 TEX. L. REV. 1029, 1036, 1039-41, 1045-48 (1980).

138. Baker expresses uncertainty over whether Ely, like Dworkin (R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, 234-39, 275-78 (1977); Dworkin, *Liberalism*, in *PUBLIC AND PRIVATE MORALITY* 113, 133-34 (S. Hampshire ed. 1978)), would refuse to allow the legislature to count "external" preferences such as racist ones, or whether he would demand that all preferences be counted. Baker, *Neutrality, Process, and Rationality as Flawed Bases for Interpreting Equal Protection*, 58 TEX. L. REV. 1029, 1043, 1047-49 (1980). The uncertainty can be traced to Ely's favorable citations to Dworkin's principle of equal concern and respect, ELY, *supra* note 1, at 82, 243 n.10, a principle that Dworkin uses to purge the legislative process of external preferences, and Ely's linking of that principle with his own concept of representation, *id.* at 82, all the time insisting that his theory is a process one.

139. Baker, *Neutrality, Process, and Rationality as Flawed Bases for Interpreting Equal Protection*, 58 TEX. L. REV. 1029, 1041 (1980). See also ELY, *supra* note 1, at 187 n.14.

140. R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, 223-39 (1977).

values. Indeed, in Baker's view, Ely's theory is 180 degrees from where Ely believes it to be. I think it more plausible, as I have said, to assume that Ely holds a very weak substantive position, one that allows almost all substantive options but those resulting from racist (and sexist) meta-rules. That position is not a pure process position, wholly free of substantive values. But it is surely much closer to one than is the position attributed to Ely by Baker.

Interestingly, a decade ago Ely identified a proper, though limited, role for concern with process in equal protection jurisprudence.¹⁴¹ Whether equal protection embodies one substantive moral theory or permits a choice among substantive moral theories, those moral theories may identify certain instances when a random procedure should be used for dispensing benefits and burdens.¹⁴² (Each theory would also identify what counts as random procedure; it might, for example, rule out using sexual groups as the groups between which a random choice is made because of secondary effects due to cultural factors, but not rule out groups defined by the alphabetical ranking of surnames.¹⁴³) A permitted or required substantive moral theory may also allow certain rules to be enacted on the basis of the legislators' aesthetic judgments. A concern with process—namely, a concern with whether decisions that could or should have been random or aesthetic were in fact random or aesthetic—is warranted for those decisions, as Ely pointed out. If equal protection allows optional moral theories, then a concern with process—with discovering the moral theory actually employed (the meta-rule) and discovering whether a mistake was made—is warranted for every decision. But even if equal protection embodies only one moral theory and leaves no true options for the government, if that theory dictates some random distributions and aesthetic judgments, a concern with process will be necessary for those decisions.

Unfortunately, Ely mistakenly assumed that his concern for process in the sense of verifying claims of random selection and aesthetic judgment could operate otherwise than within a substantive theory of equal protection. Ely explicitly adopted a value-free mistake theory, although he tried to save it from the absurdities that such a theory results in by artificially defining the ends that particular types of laws must serve.¹⁴⁴ Not only did Ely take this

141. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

142. It might, for example, require that juries be selected, or voting district lines be drawn, through some sort of random procedure. *See id.* at 1230-35; *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (esp. 83-94; Stevens, J., concurring); *Duren v. Missouri*, 439 U.S. 357 (1979) (male defendant may challenge intentional exclusion of women from the jury); *Peters v. Kiff*, 407 U.S. 493 (1972) (white defendant may challenge intentional exclusion of blacks from the jury).

143. *See, e.g., Reed v. Reed*, 404 U.S. 71 (1971); Sher, *What Makes a Lottery Fair?*, 14 NOUS 203 (1980); Note, *The Equality of Allocation by Lot*, 12 HARV. C.R.-C.L. L. REV. 113 (1977); Note, *Equal Protection: A Closer Look at Closer Scrutiny*, 76 MICH. L. REV. 771, 861-68 (1978).

144. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1224-28 (1970). Thus, for example, traffic laws must serve the goal of safety. For criticism of Ely on this point, *see* P. BREST, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 560-63 (1975); Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 134 (1972).

dubious tack, but he also removed the constraints his limitation placed on possible ends by allowing legislatures to pursue "the umbrella goal of the general welfare,"¹⁴⁵ an end that would eliminate all means/ends misfit so long as it were sincerely pursued. Because all decisionmakers probably believe that they are pursuing the general welfare, Ely's mistake theory turned out to be just as empty as other mistake theories.¹⁴⁶

Ely has changed his theory somewhat, but he is still caught between the rock of a substantive theory or theories of equality and the hard place of an empty mistake theory.

3. The "Tangling" of Equal Protection and Substantive Due Process

Several commentators, including Ira Lupu and Michael Perry, have lamented the fact that the Supreme Court keeps "tangling" equal protection and due process analyses in its opinions, unnecessarily confusing the jurisprudence of individual rights.¹⁴⁷ If my analysis of equal protection theories is correct, however, then the Supreme Court's "tangling" of equal protection and due process is quite understandable and perhaps inevitable.

First, if the Constitution embodies one moral theory, then unless that theory has as many ultimate principles as there are constitutional provisions that reflect the theory, some of those provisions will merge with others at the most abstract level.¹⁴⁸ Thus, a Benthamite moral theory underlying the Con-

145. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1246-49 (1970).

146. See Alexander, *Introduction: Motivation and Constitutionality*, 15 SAN DIEGO L. REV. 925, 935 (1978) ("[I]t is probably almost impossible to find a racist whose ultimate justification for his acts is racial oppression as an end in itself.").

147. See Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981 (1979); Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1074-83 (1979). See also Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979).

148. If each individual rights provision stands for a paradigmatic set of cases that the Framers felt constituted governmental violations of individual rights, and if the same ultimate principle of the one moral theory embodied in the Constitution can be violated in several different such paradigms (and hence under several different provisions), then when that principle is violated, so that the *Constitution* is violated, it really matters very little which provision the courts invoke. Thus, if "discrete and insular minorities" are the particular concern of equal protection, and property rights and autonomy are particular concerns of substantive due process or privileges and immunities, but the same ultimate moral principle stands behind all the provisions and determines their application, only intellectual neatness is at stake in calling a violation of the rights of minorities a due process violation, or calling a restriction on autonomy an equal protection one. See text accompanying note 44 *supra*. But see Schauer, *Response: Pornography and the First Amendment*, 40 U. PITT. L. REV. 605, 611-13 (1979).

Michael Perry's attempt to effect a neat separation of the normative bases underlying equal protection and due process, an attempt he makes in conjunction with his criticism of the Supreme Court's failure to disentangle the two clauses, illustrates the difficulties with viewing moral principles other than as part of a unified theory. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023 (1979). Perry believes equal protection is directed at classifications that are "morally irrelevant," whereas due process is directed at classifications that are "governmentally irrelevant." He fails, however, to justify or even to render coherent this distinction.

Perry begins with the rather uncontroversial contention that the Framers of the fourteenth amendment's equal protection clause were concerned to outlaw denials of specific rights to blacks because those denials reflected the assertion of the moral inferiority of blacks. It is then an easy step to generalize from that original concern to a concern with any discrimination reflecting an assertion of moral inferiority of particular races. Because this concern with assertions of moral inferiority based on race is the product of a principle that race is a

stitution would view each separate constitutional provision as a special lens, organized around a paradigm of cases of moral concern, through which to view the ultimate governing principle of utility maximization. A Rawlsian moral theory would have two ultimate principles—the “equal liberty prin-

morally irrelevant trait, “assent [to the principle, no person is by virtue of race morally inferior to another.] . . . logically requires assent to the more general proposition that it is unjust to treat a person as morally inferior to another by virtue of *any* morally irrelevant trait.” *Id.* at 1051.

Perry defends the generalization beyond race to all morally irrelevant traits by pointing out that making equal protection embody the principle of the moral irrelevance of race is itself a generalization from the more specific concerns of the Framers.

What is of principal interest here is the notion of morally irrelevant traits. Perry asks “how the Court can ascertain whether a particular trait or factor ought to be deemed morally irrelevant,” and answers:

[W]e conventionally think it proper that the extent of the respect and concern that we accord another person is a function of the extent to which we approve or disapprove that person’s choices and activities, his or her self-definition. More precisely, the principal reason for extending or withholding respect or concern is to approve or disapprove, and thereby influence, choices and activities deemed beneficial or harmful. These considerations suggest what the criterion of moral relevance should be. If a trait or other factor indicates nothing about a person’s choices or activities, and if further it indicates nothing about the person’s physical or mental capacity—in the form of native talent, acquired skills, temperament, or the like—to make particular choices or engage in particular activities, that trait or factor ought to be deemed morally irrelevant. That is, no person ought to be deemed, by virtue of such a trait or factor, less deserving of respect, concern, opportunity for self-fulfillment, or more deserving of subordination to or domination by others. Extending or withholding respect and concern on the basis of—adopting an attitude of approval or disapproval toward—a morally irrelevant trait or factor makes no sense, because the trait or factor is not an indicator, a proxy, for any particular choice, activity, talent, or skill deemed beneficial or harmful.

Id. at 1065–66.

Now I want to pause to examine Perry’s discussion of moral relevance in some detail, both because I find it confusing, and because it is extremely important to Perry’s thesis about the separation of equal protection and due process. Perry begins by appearing to equate moral relevance to moral desert. Thus, he speaks of using moral judgment to influence a person’s choices or activities. Of course, we do ordinarily premise moral praise and blame—our assessment of moral desert—on the choices a person makes. What a person has no choice about is not an appropriate criterion of his moral desert.

But the problem is that moral relevance goes far beyond moral desert. After all, such diverse moral philosophers as John Rawls (*J. RAWLS, A THEORY OF JUSTICE* (1971)) and Robert Nozick (*R. NOZICK, ANARCHY, STATE, AND UTOPIA* (1974)) separate moral entitlement from moral desert. And Perry himself is aware of the greater scope of moral relevance, for he does not deny that immutable traits—such as, for example, “native talent”—that may be quite unrelated to moral desert, are morally relevant.

Once Perry extends moral relevance to immutable factors that do not relate to moral desert and that need only be indicators, or proxies, for “any particular choice, activity, talent, or skill deemed beneficial or harmful,” then either he loses any coherent sense of moral relevance altogether, or else he must present a full-blown normative theory as a background for assessing moral relevance. If race is the source of, say, aesthetic pleasure or displeasure, then is it any different from, say, a native talent such as the ability to sing, play basketball, or make widgets? It is not different with respect to its being “an indicator . . . for any . . . talent . . . deemed beneficial or harmful.” That is, it is not different unless one has a full-blown normative theory that would explain its difference, *a full-blown normative theory that would justify and link both the values protected by equal protection and the values protected by due process.*

When Perry turns to discuss homosexuality, and why it is not an illegitimate *equal protection* classification, but why it might be an illegitimate *due process* classification, he introduces a distinction between *moral* irrelevance—an equal protection flaw that does not attach to homosexuality—and *governmental* irrelevance—a due process flaw that does attach to abortion, contraception, ideology, and perhaps homosexuality. Now I do not wish to deny Perry’s point that there are some things that are morally relevant to private persons that should not be grounds for governmental action. What I do wish to maintain, however, is that Perry’s neat distinction between factors that are morally irrelevant *vel non* (equal protection factors) and factors that are morally relevant but forbidden for government to employ (due process factors) cannot be defended. First, moral relevance always varies with the actor and the context. Thus, it is reasonable to assume that under a coherent normative theory, some factors would be morally irrelevant to private actors in some situations and not others, some factors would be morally irrelevant to government in some situations and not others, and some factors would be morally relevant to private actors but morally irrelevant to government. (It is less plausible that there would be factors that were morally irrelevant to private actors but morally relevant to government.) Eye-color might be a morally defensible basis for a private actor’s choosing a spouse but not for that actor’s choosing

ciple" and the "difference principle."¹⁴⁹ A Nozickian moral theory would have principles of acquisition, transfer, rectification, risk creation, and non-appropriation of another's body, talents, and labor.¹⁵⁰ The lines between or among ultimate principles within one moral theory may or may not conveniently fit with the lines—drawn with reference to paradigm cases—between and among the specific constitutional provision that reflect that theory.¹⁵¹

If the Constitution leaves room for governmental choice between or among ultimate moral theories—or if judicial deference or limitation create the appearance of choice from the courts' perspective—then the line between equal protection and due process might be drawn to correspond to the line between optional and nonoptional benefits and burdens. If equal protection

whom to employ, and it might be totally irrelevant to government given what the background normative theory describes as government's proper role. Or consider alienage, a factor that Perry deems morally relevant *vel non*. Again, although alienage may indeed be relevant in some contexts, and those contexts may be the very ones Perry identifies, alienage is surely not morally relevant in all contexts. Finally, if moral relevance transcends moral desert and includes use as a proxy for some relevant factor, then race, sex, and illegitimacy will surely at times be morally relevant to both private actors and to government, since they will surely at times be useful as proxies. (Proxy "talent" is surely as useful as other talents.) In short, it is hard to imagine factors that are, regardless of actor or context, always morally relevant or irrelevant. Moral relevancy is highly contextual, and few, if any, factors are morally relevant or irrelevant *vel non*.

Second, it seems doubtful that the normative principles that rule abortion to be a matter of moral irrelevance to government are totally unconnected at some level with the principles that define the moral relevance, if any, of abortion to private actors.

To summarize, moral relevance is not something that is independent of the context or the identity, public or private, of the actor, especially if one concedes that morally relevant factors extend beyond desert bases to include immutable characteristics such as native talents and so forth. And the normative theory that identifies moral relevance in each context for private actors will be the same normative theory that identifies the proper considerations for government. Put differently, the reasons why and when private actors may sometimes morally properly consider eye-color, race, and the choice to abort in dealing with others will be intricately connected with the reasons why, when, and how government can properly consider those factors. To assume otherwise is to assume a radical division among normative considerations that has no theoretical basis.

149. J. RAWLS, A THEORY OF JUSTICE 302–03 (1971). Rawls' two principles of justice, derived from his "general conception" of justice, *id.* at 303, have been widely discussed and criticized. The priority that Rawls assigns to his first principle of justice (equal liberty) has come under particularly heavy attack. See, e.g., B. BARRY, THE LIBERAL THEORY OF JUSTICE 34–43, 59–82 (1973); Daniels, *Equal Liberty and Unequal Worth of Liberty*, in *READING RAWLS* 253 (N. Daniels ed. 1975); Hart, *Rawls on Liberty and Its Priority*, 40 U. CHI. L. REV. 534 (1973). Many actions of government might violate both of Rawls' principles simultaneously. Thus, if Rawls' first principle were tied to what we normally think of as substantive due process concerns (speech, religion, privacy, etc.), and his second principle were deemed to be the governing principle of equal protection, there would still be many cases that involved both clauses, for instance, depriving someone of wealth because of his political or religious activities. The neo-Rawlsian constitutional theorists—for example, Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); D. RICHARDS, THE MORAL CRITICISM OF LAW (1977); R. DWORKIN, TAKING RIGHTS SERIOUSLY 150–83 (1977); and see Dworkin, *Liberalism*, in *PUBLIC AND PRIVATE MORALITY* 113–43 (S. Hampshire ed. 1978)—will also no doubt arrive at fewer ultimate moral principles than there are constitutional provisions through which to apply those principles. Thus, they too will "tangle" constitutional rights.

150. R. NOZICK, ANARCHY, STATE AND UTOPIA (1974). See also C. FRIED, RIGHT AND WRONG (1978) (positive rights to fair shares of resources combined with negative rights protecting against intentional harm, appropriation of one's body, talents, and labor, and unjustified risk creation).

151. Of course, the Framers might have had an ultimate theory in mind when they enacted various provisions that they believed would best implement the theory in rule-consequentialist fashion. In such a case the various provisions must be interpreted as formal rules, which may or may not be the correct rules for implementing the theory. If they are the correct rules—if the Framers were right—the result is the same as if the Court tried to implement the theory directly, since the Court would choose to do so in rule-consequentialist fashion. If they are not the correct rules, then we have a question of whether proper interpretation requires adhering to the rules or adhering to the underlying theory. See generally text accompanying notes 45–49 *supra*.

ruled out a specific set of effects, as Berger and Fiss would maintain,¹⁵² it would be easily enough distinguished from due process, though less satisfactory normatively. If, as on my interpretation of Ely,¹⁵³ equal protection ruled out a very limited set of meta-rules, such as those that are based on racial or sexual superiority as ultimate moral principles, it would again be easy enough to distinguish equal protection violations from due process ones, though equal protection might have little role to play in contemporary society.¹⁵⁴ But if equal protection allows a choice among a limited set of basic moral positions and rules out what I have called nonparallel meta-rules between those polar positions,¹⁵⁵ disentangling equal protection from due process will often be quite difficult. Disentangling will focus upon whether the defect in the rule is that the rule makes someone worse off than he would be under either polar position (below point X on Diagram C¹⁵⁶—due process), or whether the defect is that the rule does not represent solely a compromise between permissible moral positions (equal protection).

The entanglement problem can be most easily illustrated by focusing on precisely those cases that the commentators claim are really due process cases masquerading as equal protection ones. Take *Shapiro v. Thompson*¹⁵⁷—both Lupu and Perry claim that in *Shapiro* the principal defect was an infringement of the right to travel, a due process defect, through imposition of a one-year residency requirement for eligibility for welfare. But if welfare is a constitutionally optional benefit—and if the one-year residency requirement did not deter interstate migration more than complete elimination of welfare, an action that the state was constitutionally entitled to take if welfare is optional—the new residents were no worse off than they would have been under a constitutionally permissible scheme. The true defect then was not a due process one stemming from the effect on interstate travel, but rather an equal protection one stemming from the new resident/old resident distinction in the award of welfare benefits. That distinction is problematic to the extent that it cannot be shown to represent a parallel meta-rule between the moral theory that requires welfare and the moral theory that forbids welfare.

The same analysis can be made of *Chicago v. Mosley*,¹⁵⁸ a case that the Court decided on equal protection, not first amendment, grounds. The Court was justified in invoking equal protection if Chicago could, without violating the first amendment, deny all demonstrators the right to picket near schools, and if in addition denying all demonstrators except labor demonstrators that right did not leave all other demonstrators worse off than had all demonstra-

152. See text accompanying notes 81–88 *supra*.

153. See text accompanying notes 131–33 *supra*.

154. I doubt that the major battles in the future over the justice of governmental actions will center on claims of racial or sexual superiority.

155. See text accompanying Diagram G *supra*.

156. See text accompanying note 96 *supra*.

157. 394 U.S. 618 (1969) (one-year residency requirement for eligibility for welfare violates equal protection because of effect on interstate migration).

158. 408 U.S. 92 (1972) (ordinance prohibiting all but labor union picketing near schools violates equal protection because of lack of content-neutrality). See also *Consolidated Edison v. Public Service Comm.*, 100 S. Ct. 2326 (1980); *Carey v. Brown*, 100 S. Ct. 2286 (1980).

tions been banned. Upon such a hypothesis, the defect in the law was the unjustified discrimination between classes of demonstrators, an equal protection defect.¹⁵⁹

Maher v. Roe,¹⁶⁰ another case whose equal protection rather than due process focus has been severely criticized,¹⁶¹ also appears to have been correctly analyzed by the Court, though not necessarily correctly decided. There was really no evidence that poor women seeking abortions were really worse off—through deterrence or through drying up of private funds—than had the states chosen the (arguably) permissible course of not redistributing wealth in the form of health care.¹⁶² Without such evidence, the only question would be whether the governmental discrimination between those seeking abortions and those choosing childbirth, apparently to encourage the latter choice and discourage the former, was a valid discrimination in the award of an optional benefit—an equal protection question regarding whether this rule was part of a parallel compromise meta-rule.

Likewise, *Douglas v. California*¹⁶³ and *Griffin v. Illinois*¹⁶⁴ are properly considered to be equal protection cases, though the principle they announce—equal benefit to rich and poor from procedures more protective than those required by due process (optional procedures)—is extreme and has never been taken by the Court to its logical conclusion. The benefits—free counsel and transcripts—were constitutionally optional in that they were part of a proceeding (an appeal) deemed constitutionally optional by the Court. There was no showing that providing transcripts and counsel on appeal only to those who could afford them made the indigent defendants worse off than had no appeals been allowed anyone.¹⁶⁵

159. See also *Sherbert v. Verner*, 374 U.S. 398 (1967); *Speiser v. Randall*, 357 U.S. 513 (1958), for instances in which the Court struck down unequal burdens placed on members of various political and religious groups on first amendment, not equal protection, grounds, despite the apparent optionality of the benefits in question and the difficulty of showing that the burdens were more severe than any permissible meta-rule would allow. (Of course, Ms. Sherbert in fact may have been worse off than under any permissible meta-rule if she had contributed to the unemployment fund.) Cases like *Sherbert* suggest that there is a first amendment mode in equal protection law, one properly invoked whenever a compromise meta-rule is nonparallel due to religious or ideological bias. Tangling of freedom of religion and speech with equal protection is thus to be expected, though the "tangling" religious clause logically should be the establishment clause.

160. 432 U.S. 464 (1977) (medical welfare need not be provided to enable women to obtain abortions despite its being provided for the costs of live birth). See also *Harris v. McRae*, 100 S. Ct. 2701 (1980) (Brennan, J., dissenting).

161. See Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1003–11 (1979); Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1076 (1979).

162. Situations in which the government subsidizes an ideological position with optional benefits may in many cases actually make the proponents of the alternative position worse off than had no subsidy been given at all. That effect can occur because the prestige of the government is thrown on one side of the balance, and private resources are withdrawn from the other. See note 57 *supra*.

163. 372 U.S. 353 (1963) (equal protection violated by not providing indigent criminal defendant with counsel on first appeal).

164. 351 U.S. 12 (1956) (equal protection violated by not providing indigent criminal defendant with free trial transcript for his appeal).

165. One problem in *Douglas* and *Griffin*—a problem not mentioned by the Court and thus not relevant to the Court's conclusion—was that taxpayers did pay for part of the costs of the appeals, namely, the costs associated with the judges' salaries, the courtroom, and so forth. A taxpayer's subsidy for a procedure utilizable only by wealthy defendants is problematic.

Unlike *Shapiro, Mosley, Maher, Griffin, and Douglas*, which arguably are equal protection cases, *Zablocki v. Redhail*¹⁶⁶ and *Eisenstadt v. Baird*¹⁶⁷ are good examples of due process cases that were erroneously treated as equal protection ones.¹⁶⁸ In *Zablocki*, the complaint was not that the right to marry could be restricted by a financial test so long as the test somehow burdened all equally, or burdened all with similar premarital encumbrances equally. The complaint was that the right to marry could not be burdened by such a financial test irrespective of how others were burdened. Financial requirements of the type Wisconsin had imposed were not optional burdens that could pass muster under one permissible meta-rule, but were instead nonoptional burdens that could not be imposed under any permissible meta-rule. The same analysis holds for the burden placed on single persons in *Eisenstadt* with respect to the purchase of contraceptives.

Of course, in cases like *Zablocki* and *Eisenstadt*, once it is established that the absolute burden violates due process, the comparative burden is also established to be unjustified. But this comparative injustice—an apparent equal protection violation—is parasitic on establishing a noncomparative injustice—a due process violation—and adds nothing to the analysis. Every violation of due process can be viewed as an equal protection violation in the sense that every due process violation burdens some (unjustifiably) more than it burdens others. Equal protection and due process cannot be distinguished on grounds of unjustifiable unequal burdens.

The analysis in *Harper v. Virginia Board of Elections*¹⁶⁹ is a due process analysis if one views the case as an instance when extending the right to vote to some but not all rendered those without the vote worse off than had no one been given the vote, and when it was permissible to extend the vote to no one.¹⁷⁰ However, it is unlikely, given the guaranty clause,¹⁷¹ that Virginia would have been able to eliminate all voting, at least for state offices.

Finally, the separate-but-equal race cases illustrate the difficulty of disentangling equal protection from due process if one looks only at the fact that a racial classification is being employed and not at the status of the benefit being allocated (constitutionally optional or nonoptional). Some separate-but-equal cases involved benefits that have been traditionally treated as constitutionally optional—public schools,¹⁷² public parks,¹⁷³ public golf

166. 434 U.S. 374 (1978) (financial burden placed on poor parents as a condition of right to remarry violates equal protection).

167. 405 U.S. 438 (1972) (restrictions on single persons' access to contraceptives violates equal protection).

168. See Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1023–26 (1979).

169. 383 U.S. 663 (1966) (equal protection violated by imposition of poll tax).

170. Of course, one still has to examine the (objective) reasons behind the exclusion to see if the claim of a denial of due process is in fact justified; because those without the franchise are worse off than had no one been given the franchise does not mean necessarily that they are worse off than they could have been under a permissible meta-rule.

171. U.S. CONST. art. IV, § 4: "The United States shall guarantee to every State . . . a Republican Form of Government . . ."

172. *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

173. *Watson v. City of Memphis*, 373 U.S. 526 (1963).

courses;¹⁷⁴ others involved benefits that are thought of as nonoptional, natural liberties—access to public beaches,¹⁷⁵ the right to purchase real property,¹⁷⁶ access to private facilities,¹⁷⁷ or the right to choose one's spouse.¹⁷⁸ The former cases could be viewed as cases of invalid compromise meta-rules (equal protection violations), or as cases in which provision of the optional benefit on the basis of race left some worse off than under any permissible meta-rule (due process). The latter cases involved straight due process claims. The unjustified inequality between, say, the intraracial couple that was allowed to marry and the interracial couple that was prevented from marrying was secondary in consideration to the unjustified absolute burden placed on the latter couple. In other words, had Virginia's law in *Loving* in fact prevented *everyone* in Virginia from marrying the person of his or her choice and had burdened everyone precisely equally, even taking into account secondary effects of racial classifications and the varying strength of desires to marry a particular person, the gravamen of the complaint would have remained. Tangling of equal protection and due process claims is therefore attributable to one of two possible causes: either the Court perceives the Constitution as embodying one moral theory that can be invoked under *either* equal protection or due process, in which case the choice of clause is irrelevant;¹⁷⁹ or the Court perceives some benefits to be optional, some to be nonoptional, but can separate those benefits and analyze the impact of laws on them only by being very explicit about the moral theories forbidden and permitted, which the Court has failed to be.

4. Judicial Perspectives on Governmental Acts

The discussion of equal protection methodology thus far has been relevant to any governmental decisionmaker, for it has focused on the meaning of equal protection, a meaning that all governmental actors must follow. However, much of what we think of as equal protection methodology—the stock phrases employed by courts and commentators—really has less to do with the meaning of equal protection than it does with whether a governmental rule should be *presumed* by a *court* to be constitutional or unconstitutional, and how that presumption should be *rebutted*. In other words, the stock phrases of equal protection refer to evidentiary factors for courts, not primarily to factors with which other governmental decisionmakers should be concerned.

174. *Holmes v. City of Atlanta*, 223 F.2d 93 (5th Cir. 1955), *aff'd*, 350 U.S. 879 (1955); *New Orleans City Park Improvement Ass'n v. Detiege*, 252 F.2d 122 (5th Cir. 1958), *aff'd*, 358 U.S. 54 (1958).

175. *Dawson v. Mayor and City Council of Baltimore*, 220 F.2d 386 (4th Cir. 1955), *aff'd*, 350 U.S. 877 (1955) (public beaches, though additional facilities also involved).

176. *Harmon v. Tyler*, 273 U.S. 668 (1927); *Buchanan v. Warley*, 245 U.S. 60 (1917).

177. *Turner v. City of Memphis*, 369 U.S. 350 (1962); *Plessy v. Ferguson*, 163 U.S. 537 (1896).

178. *Loving v. Virginia*, 388 U.S. 1 (1967).

179. This explanation is strongly suggested by the Court's kinky fifth amendment "equal protection" jurisprudence. See *Alexander & Horton, Ingraham v. Wright: A Primer for Cruel and Unusual Jurisprudence*, 52 S. CAL. L. REV. 1305, 1373 n.249 (1979), for some of the cases in that line.

a. *Types of Judicial Scrutiny: Strict, Intermediate, and Minimal*

The courts' proper functions with respect to claims of equal protection violation are, under the nonoptional view of equal protection, to ascertain whether the governmental rule is consistent with the mandated moral theory, and, under the optional view of equal protection, to ascertain both whether the governmental rule is consistent with a permissible meta-rule in its effects and whether a permissible meta-rule was in fact intended. Full-scale, searching, judicial scrutiny in every case would be a misuse of judicial resources, however, even if it would minimize the total number of equal protection violations, because the resources expended would exceed the benefits gained.¹⁸⁰ Therefore, the courts should vary the searchingness of their review of governmental rules for impermissible effects or meta-rules according to the likelihood of discovering a violation and the seriousness of the suspected violation. The three commonly identified types of judicial review—strict, intermediate, and minimal—that probably describe ranges on a continuum of types of judicial review rather than three distinct points on such a continuum, can be viewed as responses to the varying likelihood and seriousness of unconstitutionality of different *types* of governmental rules—types defined by factors such as the nature of the classification employed or the interest affected. Thus, when a court employs minimal scrutiny of a business regulation and upholds an equal protection attack on it, the court has not said the regulation is constitutional. It has said only that there is not a sufficient probability of an improper meta-rule or serious improper effects to warrant a more searching judicial inquiry. *Primary decisionmakers—legislators and administrators—have no different constitutional obligation in the area of minimal scrutiny from their obligation in the area of strict scrutiny.* Standards of scrutiny are procedural standards for courts, not substantive standards for primary decisionmakers.¹⁸¹

b. *Triggers of the Varying Forms of Scrutiny:*
Suspect Classifications and Fundamental Interests

(1) *Suspect Classifications*

Traditionally, the nature of the classification employed in a rule has been the most important determinant of the form of judicial scrutiny invoked in

180. To say this is not to commit oneself to a utilitarian analysis of the allocation of judicial resources. A Rawlsian cost-benefit calculus can be constructed. And even a Nozickian must have a cost-benefit approach to the question of what expenditures should be made on procedures. See Alexander, *Cutting the Gordian Knot: State Action and Self-Help Repossession*, 2 HASTINGS CONST. L.Q. 893, 919–21 n.69 (1975); L. ALEXANDER, MODERN LIBERTARIAN THEORY. See also O'Fallon, *Adjudication and Contested Concepts: The Case of Equal Protection*, 54 N.Y.U.L. REV. 19, 43 (1979); Perry, *Constitutional "Fairness": Notes on Equal Protection and Due Process*, 63 VA. L. REV. 383, 398–99 n.71 (1977).

181. Even if the standards operate as formal, judicially constructed rules determining what is constitutional and unconstitutional, see text accompanying notes 208–10 *infra*, rather than as judicial presumptions of constitutionality or unconstitutionality, the primary decisionmaker would still have a constitutional obligation beyond the judicial rule if the judicial rule permitted a course of action because of the costs of judicial intervention and not because the ultimate moral principles permit it.

response. Major controversy has centered on the questions of which classifications should trigger strict scrutiny, intermediate scrutiny, and minimal scrutiny, and whether a particular kind of classification should trigger the same degree of scrutiny in all cases.

According to my analysis of equal protection, a type of classification can be relevant to the type of judicial scrutiny required in the following ways:

(1) Some classifications, *given both the historical context and the type of law in question*, strongly suggest that the decisionmaker was not pursuing the required meta-rule (nonoptional view) or a permissible meta-rule (optional view). (Although motive is immaterial on the nonoptional view, it is nonetheless probative of material effects.¹⁸²) Suspectness of classification in this sense is both a matter of degree and highly contextual, and the strictness of judicial scrutiny occasioned would accordingly be a matter of degree and highly contextual.¹⁸³ The various factors often mentioned as determinants of suspect classifications—Ely's we-they test, political powerlessness,¹⁸⁴ historical

182. See text accompanying note 196 *infra*.

183. Thus, an intermediate level of suspectness should provoke an intermediate degree of strictness of judicial review. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1082-97 (1978), for a discussion of intermediate review, its triggers and its components. One component—that the currently articulated governmental purpose for the rule actually be *the* purpose behind retaining the rule—does not fit my analysis of equal protection methodology. Under the nonoptional view, where effects are all that matter, government's actual purpose is only probative of effects, and a currently articulated purpose may be even more probative than the actual purpose. Under the optional view, we always are looking for the actual meta-rule (actual purpose) behind the rule as well as the rule's effects *under any standard of judicial review*.

Disproportionate impact upon groups whose distinguishing characteristics would render suspect any classifications that expressly employed those characteristics should provoke levels of scrutiny that vary according to the degree of disproportion and the rule's historical and subject-matter context. Treating disproportionate impact on certain groups as *always* requiring strict judicial scrutiny or as *always* requiring minimal scrutiny is even less defensible than treating explicit references to those groups as always suspect or as always nonsuspect, which itself is indefensible. Treating disproportionate impact on races, for example, as a trigger for minimal scrutiny, while treating a racial classification in similar circumstances as a trigger for strict scrutiny, places far too great a burden on characterizing a classification (e.g., skin color) as racial as opposed to nonracial with a disproportionate racial impact. Is a skin-color classification "racial?" Is a sex-specific classification (e.g., pregnancy) "sexual?" Why should it matter? The probability of an improper meta-rule varies according to the type of classification, but it does not vary in quantum leaps according to whether a classification is, say, racial as opposed to nonracial with a disproportionate impact.

(This analysis also suggests the impropriety of a two-step inquiry in disproportionate impact cases: (1) proving a covert suspect classification, then (2) requiring a compelling governmental interest to demonstrate that the suspect classification was not employed in pursuance of an improper meta-rule. The proper inquiry is a unitary one directed at ascertaining the actual meta-rule and the actual effects.)

A comment about the disproportionate racial impact equal protection theories of Ted Eisenberg and Michael Perry is in order. See Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U.L. REV. 36 (1977); Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977). Although both the mechanics and the normative underpinnings of Eisenberg's and Perry's theories are vague, I see only three coherent possibilities for the role of disproportionate racial impact in equal protection law. Disproportionate racial impact may be a proscribed effect in itself. That is Fiss' theory. See text accompanying note 82-85 *supra*. Disproportionate racial impact may be *evidence* of an improper meta-rule because of what it suggests about motives. Or disproportionate racial impact may be *evidence* of an improper meta-rule because of its usual effects. See Boyd, *Purpose and Effect in the Law of Race Discrimination: A Response to Washington v. Davis*, 57 U. DET. J. URB. L. 707, 723, 728 (1980).

184. The legislative employment of improper meta-rules is often the result, not of the legislators' nor the electorate's beliefs about moral worth, but of political threats from economically powerful interests. Indeed, the *Carolene Products* case itself, source of the famous footnote 4 (304 U.S. 144, 152-53 n.4 (1938)), may be a perfect example of a situation where legislation unjustifiable under any permissible meta-rule was passed because of the political muscle of an economically powerful interest (the milk lobby) and the political powerlessness of the opposing economic interests. See B. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980). See also S. GABIN, *JUDICIAL REVIEW AND THE REASONABLE DOUBT TEST* 77 (1980).

prejudice, immutability, and so forth—would all be considered in determining whether the classification in question, in the context of the type of rule in question, strongly suggests an improper meta-rule.¹⁸⁵

(2) Some classifications, merely by virtue of being used in a rule, generally have such major negative effects, that use of the classifications suggests that, however permissible the meta-rule being followed, it is unlikely that the effects will be those required by the meta-rule. For instance, because of historical racism and sexism that cause even innocent racial and sexual classifications to arouse suspicions; because people identify with others of their racial and sexual groups and suffer psychic harm when they or other members of their groups are harmed because of group membership; and because even an otherwise legitimate use of a racial or sexual classification may engender illegitimate uses by others, a racial or sexual classification by government may have secondary negative effects that offset its otherwise beneficial effects in terms of producing the state of affairs mandated by a permissible meta-rule.¹⁸⁶

Of course, these two ways in which classifications are relevant to judicial scrutiny are related. Motives are best proved by effects, and effects are often predicted by reference to motives.¹⁸⁷ But these two ways in which classifications are relevant are also distinct in that while the primary decisionmaker must, like the courts, be concerned with the negative secondary effects of otherwise useful classifications, the primary decisionmaker's relation to his own motives—his meta-rule—is, unlike the courts', not a matter of presumption, but one of first-hand knowledge.

(2) *Fundamental Interests*

There is a good deal of confusion over the role of so-called "fundamental interests" in equal protection methodology, primarily because "fundamental

185. Employment of classifications that, to be justified, presuppose legislative findings of very specific, "adjudicative" facts, strongly suggests an improper meta-rule reflecting unjustified hostility to the burdened group. See Alexander & Horton, *Ingraham v. Wright: A Primer for Cruel and Unusual Jurisprudence*, 52 S. CAL. L. REV. 1305, 1362 n.211 (1979). Likewise, employment of classifications that result in disproportionate impact on groups whose defining characteristics would render classifications based thereon suspect is often suspect itself. See note 183 *supra*.

186. Many of the separate-but-equal cases might be best explained as instances when racial classifications themselves produced negative effects rather than as instances of legislatures' following impermissible meta-rules. See Boyd, *Purpose and Effect in the Law of Race Discrimination: A Response to Washington v. Davis*, 57 U. DET. J. URB. L. 707, 718-19, 723 (1980). Certain factors, such as the likelihood of an inaccurate stereotype's infecting the legislative process, should lead to stricter scrutiny because of the increased likelihood that the rule's actual effects will not fit with the required or permitted meta-rules. Likewise, rules whose correlation with positive effects is based upon a prediction of how most people in a certain group will choose to act—"guilt by association" rules—may have such negative psychic effects on members of the burdened group (and sometimes the benefited group, in the case of gender classification), especially those individuals about whom the prediction is incorrect, and may have such negative effects in terms of freezing cultural roles, that the positive effects should be presumed outweighed on the balance represented by the moral theory—even if the prediction is highly accurate and the rule highly efficient. See Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 10-11 (1976); Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 YALE L.J. 1408 (1979).

187. See text accompanying note 196 *infra*. See also Alexander, *Introduction: Motivation and Constitutionality*, 15 SAN DIEGO L. REV. 925, 939-40 (1978).

interests” suggest due process concerns rather than equal protection ones. My analysis of equal protection methodology should clarify the role—or rather the roles—of fundamental interests.

First, under the nonoptional view of equal protection, in which one moral theory is mandated, fundamental interests would be those interests identified by the theory as so central that restriction on pursuit of those interests, and/or unequal distribution of those interests, are *prima facie*, though perhaps not conclusively, violative of the theory’s mandates. The courts would strictly scrutinize restrictions on and unequal allocations of those interests to determine whether the violation is real or only apparent.

Second, under the optional view of equal protection, *due process* fundamental interests would be interests that all permissible meta-rules would identify as important interests. In other words, due process fundamental interests under an optional view of equal protection are interests located in the nonoptional zone, the zone in which all permissible meta-rules overlap and require or forbid the same rules. Direct restriction on due process (non-optional) fundamental interests are *prima facie* violative of all permissible meta-rules. In addition, allocating optional benefits in a manner that might penalize exercise of the due process (nonoptional) fundamental interests should provoke the same response from both primary decisionmakers and courts as does a direct penalty on the exercise of a due process fundamental interest.¹⁸⁸

Third, under the optional view of equal protection, there are true equal protection “fundamental interests.” They are optional in that under one permissible meta-rule they need not be allocated to anyone. However, they may be so vital under the other permissible meta-rule that their unequal allocation¹⁸⁹ strongly suggests a nonparallel, improper meta-rule. Public education, at least on the primary level, and welfare for subsistence¹⁹⁰ and health are interests whose allocation other than on the basis of equal benefits for equal needs strongly suggests something other than a compromise between, say, Rawls and Nozick.¹⁹¹ Alternatively, these equal protection “fundamental interests” may be “fundamental” because of their highly competitive nature; their unequal provision may make one worse off than had there been no allocation at all, a *due process* violation.¹⁹²

188. See text accompanying note 157 *supra*.

189. Or, rather, the degree of inequality in their allocation times their importance.

190. But see *Dandridge v. Williams*, 397 U.S. 471 (1970). *Dandridge* is quite inconsistent in flavor if not holding with cases like *U.S. Dep’t of Agriculture v. Moreno*, 413 U.S. 528 (1973); *U.S. Dep’t of Agriculture v. Murry*, 413 U.S. 508 (1973); and *Goldberg v. Kelly*, 397 U.S. 254 (1970).

191. Of course, sometimes deviation from equal benefits for equal needs is to the absolute advantage of those who are comparatively disadvantaged and thus is a Rawlsian deviation. The educationally neediest, for example, may benefit more from expenditures on the most talented students than from expenditures directly for their benefit because of trickle-down effects. The same may be true of public expenditures to preserve the perfect health of one who is working on a cancer cure. Ordinarily, however, spending health or education welfare on the *more* advantaged of the sick or uneducated cannot be justified on Rawlsian grounds, *i.e.*, as a valid Rawlsian-Nozickian compromise. This analysis should, by the way, provide a framework for viewing the dispute over whether equal protection requires equal inputs or equal outputs in public education.

192. See note 162 *supra*. See also Alexander, *Introduction: Motivation and Constitutionality*, 15 SAN DIEGO L. REV. 925, 940–41 n.54 (1978).

(3) *Motives and Effects*

There has been tremendous confusion over the roles of motives and effects in equal protection jurisprudence, part of which has been occasioned by the Supreme Court's doctrinal vacillations,¹⁹³ part of which has been occasioned by the peculiar procedural nature of certain interests,¹⁹⁴ and part of which has been occasioned by an inadequate theoretical framework.

Under a nonoptional view of equal protection, the decisionmaker's motive does not affect the inherent constitutionality of his rule (except when he is mandated to use a random procedure or to make an aesthetic judgment¹⁹⁵). Effects are generally all that matter. However, the decisionmaker's ultimate motive—his meta-rule—and his intermediate motives can be probative of the effects of his rule to the extent those effects are uncertain from the judicial perspective. Thus, when it is debatable whether the effects of a rule will be those required by the one moral theory underlying the Constitution, whether the decisionmaker was trying to comply with that theory and whether he was acting on mistaken assumptions are relevant to predicting what effects the law will actually have.¹⁹⁶

Under an optional view of equal protection, ultimate motives—meta-rules—are directly at issue, and so too are effects. The meta-rule must be a permissible one (or a permissible compromise), but the effects of the law must also be consistent with a permissible (or compromise) meta-rule.¹⁹⁷

Intermediate motives and mental states are *not* determinants of constitutionality. However, they are probative of both ultimate motives and effects. So too are other factors that concern the process by which the challenged decision was arrived at—for example, the type of governmental institution that rendered the decision (a legislature with general legislative authority versus an administrative body with specialized authority¹⁹⁸ versus a referendum¹⁹⁹) and the type of evidence used and procedure followed by the institution.²⁰⁰

193. Compare *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976); and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), with *Palmer v. Thompson*, 403 U.S. 217 (1971); and *United States v. O'Brien*, 391 U.S. 367 (1968).

194. See *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (districting); *Duren v. Missouri*, 439 U.S. 357 (1979) (jury selection); *Peters v. Kiff*, 407 U.S. 493 (1972) (same).

195. See text accompanying notes 141–43 *supra*.

196. See Alexander, *Introduction: Motivation and Constitutionality*, 15 SAN DIEGO L. REV. 925, 930–31, 934 (1978).

197. See text accompanying notes 89–102 *supra*.

198. See *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1137–46 (1978).

199. See Sager, *Insular Majorities Unabated*; *Warth v. Seldin* and *City of Eastlake v. Forest City Enterprises, Inc.*, 91 HARV. L. REV. 1373, 1411–18 (1978).

200. See Alexander, *Introduction: Motivation and Constitutionality*, 15 SAN DIEGO L. REV. 925, 934 (1978); Alexander & Horton, *Ingraham v. Wright: A Primer for Cruel and Unusual Jurisprudence*, 32 S. CAL. L. REV. 1305, 1354–58 (1979); Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1184–90 (1977).

(4) *Means/Ends Fit*

Government must, under the nonoptional view of equal protection, act to produce the required effects—the effects that “fit” with the underlying moral theory. Under the optional view, government must produce effects that “fit” with a permissible moral theory. Under either view the only “fit” or “misfit” that is constitutionally relevant is “fit” at the level of generality at which the theory is stated. Thus, the effects that “fit” with Rawls are those effects that can be redescribed as “maximizing the position of the least advantaged.”

When the governmental “ends” in terms of which the “fit” of laws is gauged are described at a level more specific than the level at which the ultimate moral justification must be expressed—when, for instance, the end in terms of which a genetic screening law’s “fit” is gauged is described as “health,” or, more specifically, “genetic health,” rather than as “the precise mix of health and other ends necessary to maximize the position of the least advantaged”—proof of fit does not prove the law is constitutional, and proof of misfit does not prove the law is unconstitutional. However, when minimal judicial scrutiny is warranted, a court may decide—once it takes a glance at the effects of the rule in question and sees that the rule is somewhat related to a legitimate end, defined at a level intermediate between the specific language of the rule and the ultimate moral theory²⁰¹—that the likelihood of constitutionality is so high that it is not worthwhile to investigate further the effects of the rule. It may decide, that is, that given the initial high probability of constitutionality, a showing of some fit with a relatively specifically defined legitimate end warrants a judgment that the probability is now higher that the rule *fits perfectly* with that *mix of relatively specific legitimate ends* that is required by the relevant moral theory. When stricter scrutiny is warranted because the initial probability of constitutionality is lower, the court may define the ends of the governmental rules at a higher level of generality—a level nearer to that on which the moral theory is expressed—and also require a more substantial relation or even a necessary one between the rules and the ends.²⁰²

One note that should be added at this point in the discussion is that the various standards of judicial scrutiny are standards that are responses to how

201. The only truly legitimate end is, of course, the implementation of the permissible or required moral theory. Any other ultimate end is illegitimate. More specific ends may be described as “legitimate,” however, if they are recognized as “goods” under the theory—generally required by the theory—and illegitimate if they are recognized as “bads.” For discussion of the level of generality at which ends are defined in order to test “fit” under the various forms of scrutiny, see P. BREST, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 565–66 (1975); Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 128–32 (1972).

202. The “less restrictive alternative” approach is just another way of describing the necessary relation approach. However formulated, the approach is manipulable because it is tied to how specifically the ends are defined in terms of which necessity or less restrictive alternatives are gauged. Again, strictly speaking, any law to be constitutional must be necessary to serve those ends identified at the level of generality at which the relevant moral theory is expressed. Any law for which there is truly a less restrictive alternative is unconstitutional; for an alternative that is more restrictive in terms of a moral theory than is necessary for implementing that moral theory must perforce violate that theory.

the *average* court or judge should view the initial probability of constitutionality of particular types of governmental rules. A particular court or judge, however, may not be average in that the court or judge may have more expertise in an area than is normal. That fact will mean that a rule that would normally justify only minimal judicial scrutiny may provoke—and perhaps justify—more searching judicial scrutiny when the court has some expertise concerning either the likely motives behind the rule or the rule's likely effects. For example, a rule regulating train length, ostensibly for safety purposes, or a rule regulating opticians, may be a kind of rule—so-called economic or social legislation—that normally should receive little judicial investigation because the likelihood of impermissible motives and effects is too low to warrant legislative second-guessing by the average, inexperienced court. But if the reviewing judge herself believes that she is expert in the motive of the legislature that passed that rule or in the effects that rule will have, she will find it psychologically difficult if not impossible to indulge in the same presumption of constitutionality as the average judge. If she *is* an expert, perhaps that presumption *should* be lower for her.

Standards of judicial scrutiny are thus not only ranges on a continuum; they are also unstable and vary, perhaps justifiably, according to the assumed and real expertise of the court in question. The tactical lesson here for the advocate attacking a governmental rule that is normally accorded a heavy presumption of constitutionality and minimal judicial scrutiny is to try every means possible to get the court to look at her proof of the rule's mischievous and irrational effects and the dubious motives behind its enactment. Once the court peeks and feels itself to have been educated, it may decide the rule *is* irrational or the result of improper motives. In such a case the court will never be able psychologically to give the rule the same presumption of constitutionality that it did initially, although the court still might decide that it should not trust its judgment in cases of that type and should trust the legislative judgment.

(5) *Compellingness of Governmental Ends*

The compellingness of the legitimate ends that a government rule serves is also a frequently invoked ingredient in the methodology of judicial scrutiny. Sometimes those ends must be only "legitimate." Sometimes those ends must be "important." At other times those ends must be "compelling."

The compellingness of those governmental ends that the court can perceive *are* effected by the rule in question is a relevant factor under the analysis I have given. The reasons that the compellingness of governmental ends is relevant are: (1) The suspicion of an improper meta-rule that is raised by factors like suspect classifications is allayed by showing that the factors are necessary to serve an important or compelling end; and (2) the negative effects that can be expected with a particular type of rule can also be expected to be a worthwhile price given that the rule in question serves an important or compelling end. The notion of importance and compellingness that make importance and compellingness relevant here is derived from the permissible

or mandatory moral theory. That is, an end is important if its achievement is usually required by the theory, and it is compelling if its achievement is almost always required by the theory.

(6) *Standing*

Resolving who has standing to raise an equal protection challenge is a function of the moral theory or theories that are embodied in the clause and that function as the justificatory background.²⁰³ The standing questions thus are: Who under the relevant moral theory has the primary right²⁰⁴ that is correlative to the duty that the theory imposes on government (who might be able to waive the government's duty)?; and, who has a right that is derived from the person with the primary right?²⁰⁵ Standing questions might be very difficult under the nonoptional view of equal protection, depending upon the moral theory chosen. Under the optional view, standing questions could be doubly difficult because each of the permissible moral theories that is violated might designate a different group of persons as the ones whose rights have been infringed.

(In the case of nonparallel compromise meta-rules, it appears that mere inequality of treatment will have to be sufficient to grant anyone who is comparatively disadvantaged standing *so long as that person is one whose acquiescence in the inequality would cut off claims of anyone else*.²⁰⁶ For example, if Gordon builds a lavish pool for Wilbur and a small pool for Betty because he believes women have inferior moral worth, and the result is that Wilbur's out-of-town girlfriend is benefited, and Betty's out-of-town boyfriend is harmed, does Betty's boyfriend have standing?²⁰⁷ On the one hand, a

203. I thus take as correct the view of standing so ably presented by Lee Albert. Albert, *Justiciability and Theories of Judicial Review: A Remote Relationship*, 50 S. CAL. L. REV. 1139, 1144-54 (1978); Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L. J. 425 (1974).

204. I use the term "right" here with full appreciation of the philosophical controversy over its proper use. (For example, must "rights" be waivable by their possessors, or may infants and animals also have "rights" properly so called? And within act-utilitarianism or act-egalitarianism, is there anything other than one basic, nonwaivable "right," possessed by everyone, that all others comply with the one basic moral duty to act so as to produce maximum aggregate utility or maximum equal utility? And can any consequentialist justification—rule or act—fully account for the way rights figure in moral discourse?)

205. See *Craig v. Boren*, 429 U.S. 190, 192-97 (1976); *Singleton v. Wulff*, 428 U.S. 106 (1976); *Eisenstadt v. Baird*, 405 U.S. 438, 443-46 (1972); *Barrows v. Jackson*, 346 U.S. 249, 254-60 (1953); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

206. See, e.g., *Orr v. Orr*, 440 U.S. 268 (1979). Mr. Orr was given standing to challenge the preference for women in awarding alimony, even though under the permissible meta-rule most likely to be selected by Alabama—alimony based on need—non-needy males like Mr. Orr would be no better off. Standing makes sense so long as a regime of "no alimony regardless of need," under which Mr. Orr *would* benefit, is consistent with a permissible meta-rule. On the other hand, the owner of the store with which Mr. Orr trades would *not* have standing, even though she might be harmed by the alimony award against Mr. Orr. See also *Carey v. Brown*, 100 S. Ct. 2286, 2303-05 (1980) (Rehnquist, J., dissenting).

207. Or suppose the challenge in *Washington v. Davis*, 426 U.S. 229 (1976), to the test required for policemen in Washington, D.C.—which test was failed by blacks in disproportionately high numbers—had been brought by a *white* who failed the test on the ground that the test was adopted out of hostility towards blacks. Or suppose that the admission procedure in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), reflected hostility toward a sub-group of whites, a sub-group of which Bakke himself was not a member, and permissible meta-rules would either treat that sub-group but not Bakke's sub-group preferentially or treat no group preferentially.

parallel meta-rule might improve the lot of Betty's boyfriend if Betty's pool were raised to Wilbur's standards and not the reverse. On the other hand, Betty might not want equal treatment, or might grow tired of her boyfriend; in either case, the boyfriend would have no claim to the better pool. The better result would be to deny him standing.)

(7) *Formal Judicial Rules Developed Under a Nonformal View
of Equal Protection*

As I mentioned earlier,²⁰⁸ even if equal protection or other constitutional provisions embody nonformal moral principles, those principles might be best implemented through the development of formal rules by the judiciary as well as by the legislature. The rules would not produce exactly the same results in individual cases as would be produced by an omniscient decisionmaker following the nonformal principles; but the rules would produce results closer to those of the omniscient decisionmaker than would the nonformal principles themselves in the hands of fallible legislators, administrators, and judges. Their formality—their rigid, mechanical, opaque quality—could render them easy to use, and their use easy to predict and to monitor, unlike the nonformal principles.²⁰⁹

If the Supreme Court employed its current three-tiered scrutiny somewhat more mechanically and thus made its equal protection decisions more predictable, the three-tiered scrutiny might pass for three formal rules of equal protection. If, for example, suspect and semi-suspect classifications, fundamental interests, compelling and important governmental interests, and necessary and substantial fit could all be defined in a mechanical fashion, so that their application did not require recourse to the ultimate moral principles and all the facts to which those principles would be sensitive, they might be aspects of justifiable formal rules under some plausible moral theory. Or the Court, perhaps with the aid of Congress, might develop more than three "rules" of equal protection. Perhaps, too, some types of governmental actions would not fall under any of the equal protection "rules" and would require recourse to the equal protection "principles."

In any event, the Court's present equal protection jurisprudence is not rule-like and cannot be justified, as formal rules can be justified, in terms of predictability and ease of application.²¹⁰ At the same time, neither does the Court's present equal protection approach directly employ an expressly identified ultimate moral theory or theories case by case.

208. See text accompanying note 43 *supra*.

209. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 277 (1977); Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953, 976, 983 (1978); Dworkin, *Liberalism*, in *PUBLIC AND PRIVATE MORALITY* 113, 134-35 (S. Hampshire ed. 1978); Dworkin, *Social Sciences and Constitutional Rights*, 6 J. LAW & EDUC. 3, 10-12 (1977); O'Fallon, *Adjudication and Contested Concepts: The Case of Equal Protection*, 54 N.Y.U.L. REV. 19, 44-50 (1979). See also P. BREST, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 488-89 (1975).

210. For discussion of *per se* rules in constitutional law, see P. BREST, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 994-1003, 1077-79 (1975).

5. *In Retrospect: Three Myths About Equal Protection Dispelled*

Development of a coherent equal protection methodology has been hampered by three myths that the above analysis should put to rest.

The first equal protection myth is that, while due process requires substantive evaluations of governmental rules, equal protection is a purely procedural limitation. The process theories of equal protection, however, either turn out to be empty and pointless requirements that government not make mistakes in matching its means to its ends, whatever those ends might be, or else they turn out to be substantive theories at bottom.

The second equal protection myth is that the substantive values behind equal protection are independent of the substantive values behind other constitutional provisions. However, although equal protection theories can be constructed around values that are unrelated to other constitutional values because they are not related to a set of ultimate values from which all constitutional values flow, such theories are normatively unsatisfactory. For that reason, they are less plausible in terms of proper standards of interpretation and judicial review.

The third equal protection myth is that the judgments of comparative justice for which equal protection calls are somehow easier to make than the judgments of noncomparative justice called for by other provisions.²¹¹ But the comparative judgments—what are the relevant similarities and differences between classes affected by the law, and what similarity or difference of treatment do they justify—in fact assume a system of noncomparative justice as a background, which system is sufficient as well as necessary for the comparative judgments.²¹² Of course, there could be a concept of equality that lies at the core of the noncomparative system itself, as is true of the moral theories of Dworkin,²¹³ Rawls,²¹⁴ Bentham,²¹⁵ and even Nozick.²¹⁶ But that concept of equality would itself merge comparative, equal protection judgments with noncomparative, due process ones. It would surely not render comparative judgments easier than noncomparative ones.

211. The classic statement reflecting this myth is Justice Jackson's in *Railway Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring):

Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable.

Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact.

Justice Jackson cannot mean that equal protection judgments do not disable democratic government from pursuing certain ends; after all, requiring a rule to be broader in scope defeats whatever purposes government had in making that scope narrower. Justice Jackson must be taken here to mean that the judgments of arbitrariness that invoke equal protection must be less controversial, more self-evident, more "neutral," than the judgments of arbitrariness that invoke due process. See also Baker, *Neutrality, Process, and Rationality as Flawed Bases for Interpreting Equal Protection*, 58 TEX. L. REV. 1029, 1032 (1980).

212. See Montague, *Comparative and Non-Comparative Justice*, 30 PHIL. Q. 131 (1980); Feinberg, *Non-Comparative Justice*, 83 PHIL. REV. 297 (1974). See also Alexander, *The Doomsday Device: Proportionality, Punishment and Prevention*, 63 MONIST 199 (1980).

213. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

214. J. RAWLS, *A THEORY OF JUSTICE* (1971).

215. J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (1789).

216. R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

IV. CONCLUSION

It has been my aim in this Article, not to solve equal protection problems, but to show what those problems are given various views of what equal protection is. Some problems—those concerning what constitutional interpretation is and whether it is necessary—are problems for any theory of equal protection. So too are the problems of identifying the moral theory or theories on which equal protection rests and specifying equal protection's relation—as a full or partial embodiment, and as an ultimate principle or an intermediate rule—to that theory or those theories and to other constitutional clauses. Other problems are unique to nonoptional theories (for example, what decisions remain for the democratic branches except instrumental ones?); still others are unique to optional theories (for example, the problem of not “freezing” government into one of the optional theories, the problem of identifying proper compromises between or among optional theories, and the problem of intermediate mistakes). I have not canvassed all possible problems, even all possible problems at the theoretical level at which I have been dealing. But I hope that I have identified the major theoretical problems and provided the framework for future discourse on equal protection theory.²¹⁷

217. I wish to thank Paul Horton and Stanley Ingber for their helpful comments.